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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 118.

THE CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE PULLMAN SOUTHERN CAR COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED SEPTEMBER 27, 1887.

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a UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY, Plaintiffs in Error,
vs.
PULLMAN SOUTHERN CAR COMPANY, Defendants in Error.
} No. 11427.

Farrar & Simonds and T. J. Semmes, Esquires, for plaintiffs in error; Farrar & Kruttschnitt, Hargis & Eastin, and Sterling B. Toney, Esquires, for defendants in error.

Writ of error returnable to the Supreme Court of the United States, at the city of Washington, D. C., on the second Monday of October, A. D. 1887.

Transcript of Record.

1 PULLMAN SOUTHERN CAR CO.
vs.
CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD CO.
} No. 11427.

Petition. Filed September 20, 1886.

To the honorable the judges of the circuit court of the United States in and for the fifth judicial circuit and eastern district of Louisiana:

The petition of the Pullman Southern Car Company, a corporation incorporated under and by virtue of the laws of the State of Kentucky, and as such a citizen of said State, with due respect showeth—

That the Chicago, St. Louis and New Orleans Railroad Company, a corporation incorporated under the laws of the State of Louisiana, and as such a citizen of said State, having its domicile in the city of New Orleans, in this district, is justly and truly indebted unto your petitioner in the sum of thirty-five thousand three hundred dollars, with legal interest from the 27th day of May, 1882, for this, to wit:

That petitioner is now engaged and for many years has been engaged in the business of making, operating, selling, and running sleeping cars, and of hiring the same to railroad companies under contracts, to be used and employed on and over the lines of
2 said railroad companies, receiving therefor compensation, and that defendant is and at the times hereinafter mentioned was engaged in operating a line of railroad from the city of Chicago, in the State of Illinois, to the city of New Orleans, in the State of Louisiana, and elsewhere, and is and was engaged in running and operating trains of cars between said cities and to intermediate and other points as a common carrier; that on or about the 5th day of April, 1879, a contract in writing was entered into by and between your petitioner and the said defendant, whereby petitioner, in con-

sideration of the covenants and agreements of said defendant, agreed with said defendant that petitioner would furnish sleeping cars to be used by the said defendant for the transportation of passengers to meet the requirements of travel on and over its said lines of railroad and on and over all lines of railroad which it then controlled or might thereafter control, by ownership, lease, or otherwise, and that among the cars so furnished should be two sleeping cars known as the "Great Northern" and the "Louisiana;" that by said contract it was, among other things, provided that the said railroad company should use the said sleeping cars so furnished it for the purpose of accommodating its passengers as aforesaid, and that during the continuance of said contract said railroad company should repair and renew all damages and loss to the said sleeping cars of every kind occasioned by accident or casualty, and that the plaintiff, The Pullman Southern Car Company, should not have to make or pay for
any repairs or renewals which might be necessary by accident
3 or casualty, unless such loss and damage arose from defective
heating apparatus or lights furnished for said cars by the
Pullman Southern Car Company; that by said contract the said railroad company agreed, when requested by petitioner, to make promptly such repairs to the cars furnished under said contract as might from time to time become necessary and which said railroad was under said contract bound to make, and that by said contract it was further provided that all repairs and improvements to said cars rendered necessary by accident or casualty should be made and paid for by the said railroad company; all of which will more particularly appear by a copy of the said contract, hereto annexed and made part of this petition, marked Document "A."

Petitioner further avers that, under and in pursuance of the said contract and during the continuance of the same, it did furnish to the defendant sleeping cars, to be used by the said defendant for the transportation of its passengers, to meet the requirements of travel on and over its line of railroad and in accordance with the said contract; and, among others, did furnish the sleeping cars named, to wit, the "Great Northern" and the "Louisiana," and that the said sleeping cars were accepted by the said railroad company as satisfactory to the general manager and superintendent of the said railroad company; and petitioner further avers that thereafter and after the said sleeping cars had been so furnished by it to the defendant and during the continuance of the said contract the said cars were
carried by the said railroad company to New Orleans, Louis-
4 iana, and while in the city of New Orleans, in the custody of
the defendant and entirely under its control and in the depot
and premises of the said defendant, the same were greatly damaged on or about the 27th day of May, 1882, by accident or casualty, to wit, the said cars were burned by fire.

Petitioner further avers that the said fire and the said burning of the said cars was by accident and casualty, to wit, by the accidental burning and destruction of the depot of the defendant company in the city of New Orleans, wherein the said cars were housed; that the said accident and casualty did not occur and the said loss and damage did not occur to said cars from defective heating apparatus or from lights furnished by your petitioner.

And petitioner further avers that under and by virtue of the terms of the said contract it became and was the duty of the said railroad company and it agreed and promised that it would repair all the said damages to said cars, and that petitioner demanded of defendant that it should repair the damages aforesaid to said cars, and should so repair and renew the said cars or so much thereof as was burnt, but that the defendant failed and refused so to do, and has never repaired said cars or either of them, or renewed the same or repaired said damages in any manner, nor has it ever paid to the plaintiff nor to any one for the plaintiff the said damages or any part thereof or the value of said cars or any part thereof; that the said cars, the "Great Northern" and the "Louisiana," at the time
5 of said damage were of the reasonable value of not less than thirty-five thousand three hundred dollars, and that the plaintiff's damage sustained by the said casualty and accident was not less than said sum, thirty-five thousand three hundred dollars, and that to repair the same according to the terms of said contract would cost at least the sum of thirty-five thousand three hundred dollars.

Petitioner avers amicable demand and refusal to pay.

Wherefore petitioner prays that the said Chicago, St. Louis & New Orleans Railroad Company may, through its proper officer, be cited to answer this demand, and that after due proceedings had there may be judgment in favor of your petitioner and against the said Chicago, St. Louis and New Orleans Railroad Company for the sum of thirty-five thousand three hundred dollars, with legal interest from the 27th day of May, 1882, until paid; and petitioner prays for costs and for all further and general relief.

(Signed) FARRAR & KRUTTSCHNITT, *Att'ys.*
HARGIS & EASTIN,
STERLING B. TONEY,
Of Counsel for Plaintiff.

Copy of Contract between the Chicago, St. Louis & New Orleans Railroad Company and Pullman's Southern Car Co., Marked Document "A," Annexed to Petition and Filed Sept. 20, 1886.

6 This indenture, made this 5th day of April, A. D. 1879, between the Chicago, St. Louis and New Orleans Railroad Company, hereinafter called the railway company, of the one part, and the Pullman Southern Car Company, hereinafter called the Pullman Company, of the other part:

Whereas the Pullman Company is now engaged in the business of operating railway cars known as drawing-room cars and sleeping cars, under certain patents belonging to it, and of hiring the same to railway companies, under written contracts for a term of years, to be used and employed on and over the lines of the roads of said railway companies, and receiving therefor income and revenue by the sale to passengers of seats, berths, and accommodations therein;

And whereas the railway company is desirous of availing itself of the use on and over its lines of road of the cars constructed under the sleeping and drawing-room car patents now the property of the Pullman Company, and also of connections by means of said cars with other lines of railway wherein said cars are now operated by the Pullman Company:

Now this contract witnesseth:

First. That the Pullman Company, in consideration of the covenants and agreements of the railway company hereinafter mentioned, to be by it kept and performed, hereby agrees with the railway company that it will furnish drawing-room cars and sleeping cars to be used by the railway company for the transportation of passengers sufficient to meet the requirements of travel on and over
7 its line of railway and on and over all lines of railway which
it now controls or may hereafter control, by ownership, lease, or otherwise; said cars to be satisfactory to the general manager or superintendent of the railway company, the cars so furnished to be in part the cars now operated on the lines of the railway company, namely, Autocrat, Bolivar, Great Northern, Grenada, Jackson, La Branche, Louisiana, Natchez, Norman, Templar.

Second. The Pullman Company hereby agrees, at its own proper cost and expense, to furnish one or more employés, as may be needful, upon each of said cars, whose duty shall be to collect fares for the accommodation furnished in said cars, and generally to wait upon passengers therein and provide for their comfort.

Third. The railway company hereby agrees that the general officers of the Pullman Company and the employés named in article second of this agreement shall be entitled to free passage over the lines of the railway company when they are on duty for the Pullman Company.

Fourth. The Pullman Company hereby agrees that the general officers of the railway company shall be entitled to free passes in any of the cars furnished by the Pullman Company under this contract.

Fifth. It is hereby mutually agreed that the said employés of the Pullman Company named in article second of this contract shall be governed by and subject to the rules and regulations of the railway company which are or may be adopted from time to time for the government of its own employés; and in the event of any liability arising against the railway company
8 for personal injury, death, or otherwise of any employé of
the Pullman Company, it is hereby distinctly understood and agreed that the railway company shall be liable only to the same extent it would be if the person injured was an employé in fact of the railway company, and for all liability in excess thereof shall be indemnified and paid by the Pullman Company.

Sixth. In consideration of the use of the aforesaid cars the railway company hereby agrees to haul the same on the passenger trains on its own line of road and on all roads which it now controls or may hereafter control by ownership, lease, or otherwise, and also on all passenger trains in which it may, by virtue of contracts or running arrangements with other roads, have the right to use such cars in such manner as will best accommodate passengers desiring the use of said cars.

And the railway company shall, at its own expense, furnish and apply the necessary lubricating material, provide ice, fuel, and material for lights, and shall wash and cleanse all cars furnished under this contract, and shall, as often as necessary, renew and replace links and pins, bell cord and couplings and couplings for air-brake hose without charge to the Pullman Company.

Seventh. The Pullman Company hereby agrees that it will keep the cars furnished under this contract in good order and repair, and will, from time to time, renew and improve the same when necessary at its own expense, and will keep said cars up to the
9 average standard of the best and most approved sleeping cars
run on any railroad in the United States which uses an equal number of sleeping cars, excepting repairs and renewals provided for in article sixth of this agreement and such as are made necessary by accident or casualty, it being understood that the railway company shall repair all damages to said cars of every kind occasioned by accident or casualty during the continuance of this contract, except that the Pullman Company assumes all responsibility for any loss or damage occurring to said cars arising from defective heating apparatus or lights furnished by it.

And the railway company agrees, as proper compensation for the maintenance of the running gear and bodies of said cars, that it will pay to the Pullman Company the sum of three cents per car per mile for every mile run by said cars upon the road of the railway company or upon the roads of other companies by direction of the officers of the railway company while in service under this contract.

And the railway company hereby agrees, at all times when requested by the Pullman Company, to make promptly such repairs to the cars furnished under this contract as may from time to time become necessary, and to make, without request, such repairs as may be required to ensure their safety, rendering bills monthly to the Pullman Company for repairs to cars and charging for the same only the actual cost of material and labor expended on such repairs, with an addition of ten (10) per cent. to cover general expenses, all settlements and payments for mileage and repairs to be made monthly between said companies.

But it is hereby understood and agreed that whenever
10 the revenue from sales of seats and berths equals an
average of seventy-five hundred dollars ($7,500) per car per annum upon the number of cars furnished under this contract, then, while such revenue shall continue, the railway company shall not be required to pay mileage for any cars furnished under this contract; and the Pullman Company shall then bear the expense of all the repairs and improvements to said cars except such repairs as are rendered necessary by accident or casualty and such as are provided for in article sixth of this agreement, which shall be made by the railway company, as hereinbefore mentioned.

Eighth. The railway company agrees to furnish the Pullman Company, without charge, at convenient points, room and conveniences for airing and storing bedding.

Ninth. The railway company further agrees that the Pullman Company shall be entitled to collect from each and every person occupying said cars such sum for said occupancy as may be usual on competing lines furnishing equal accommodations, and that such rules and regulations shall be mutually agreed upon as will most favor the renting of seats and berths in said cars.

Tenth. The railway company hereby agrees to permit the Pullman Company to place its tickets for seats and berths for sale in such of the railroad ticket offices as may be desired by the Pullman Company, and such service shall be performed by and as a part of the general duties of the ticket agents and without charge to the Pullman Company, proceeds of such sales to be at the risk of the Pullman Company.

Eleventh. The railway company hereby agrees that the
11 Pullman Company shall have the exclusive right, for a term
of fifteen years from the date hereof, to furnish for the use of the railway company drawing-room or parlor and sleeping cars on all the passenger trains of the railway company and over its entire line of railway and on all roads which it controls or may hereafter control by ownership, lease, or otherwise, and also on all passenger trains on which it may, by virtue of contracts or running arrangements with other roads, have the right to use such cars, and that it will not contract with any other party to run said class of cars on and over said lines of road during said period of fifteen years.

Twelfth. The Pullman Company, for the consideration aforesaid, hereby guarantees the railway company against all damages of whatsoever kind which may be by the railway company incurred in consequence of any infringement of any patent rights in the construction and use of any of said cars which may be used by the Pullman Company upon the lines of the railway company under this agreement, it being the meaning and intent of this article that the Pullman Company shall secure the railway company against all manner of expenditures which may be incurred by it in consequence of any litigations connected with alleged infringements of patent rights for the interior arrangements of said cars, and that the Pullman Company will pay off and discharge all judgments obtained at any time against the railway company on account of such infringements.

12 Thirteenth. It is mutually agreed between the parties hereto
that in case either of said parties shall fail to cleanse or repair, according to the conditions of this agreement, any of said cars, then and in that case, after written notice shall have been given to the defaulting party by the other party of the default complained of, and the said defaulting party shall neglect or refuse so to cleanse or repair said cars within a reasonable time after such notice, the other party shall have the right to cleanse and make or cause to be made all necessary repairs and renewals to said cars, and said defaulting party shall pay to the other party the cost of such portion of the

cleansing and repairs as said defaulting party is held to be liable for by the terms of this contract.

Fourteenth. It is mutually agreed between the parties hereto that in case either of said parties shall at any time hereafter fail to keep and perform any of the covenants herein contained to be by them respectively kept and performed, then and in that case, after written notice shall have been given to the defaulting party hereto of the default complained of, if the said defaulting party shall refuse or neglect to make good, keep, and fulfill such unfulfilled covenants and conditions of this agreement within a reasonable time after such notice, the other party shall be at liberty to declare this contract ended and no longer in force.

And the railway company shall have the option and may elect to terminate this contract at the end of five years or at the end 13 of eight years or at the end of eleven years from —, provided that in case the railway company shall elect to terminate it at any of the above-named periods it shall give notice, in writing, to the Pullman Company of its intention to do so at least six months before the day on which it may elect, as above stated, to have the agreement end; and provided also that in case this agreement is thus terminated prior to its expiration, at the election of the railway company and not by reason of any default of the Pullman Company, then and in that case the railroad company shall purchase the cars and equipments of the Pullman Company then in use or assigned and accepted for use upon its lines under this contract, or such interest therein as the railway company may not have previously acquired under the provisions of this contract, at the actual cash value of the same, which value shall, in default of mutual agreement, be fixed by arbitration; and in the event of such purchase the railroad company shall have the right to use the same and all things connected with said cars, or as many cars, without charge for patent rights for the interior arrangements of the same, which may be owned or controlled by the Pullman Company.

For the purposes of the option hereinbefore last provided, it is hereby mutually agreed that the cars now running on said railroad and which shall form part of the cars and equipments to be furnished under this contract, together with such additional cars and equipments as may hereafter be assigned to the railway company, shall be appraised by competent persons, one to be appointed by the railway company and one by the Pullman Company, they two, 14 in case of disagreement, to appoint a third, and the decision of two to be final, and the value fixed by them shall be taken as the value which the railway company shall pay in purchasing said cars and equipments.

The taxes upon the cars furnished to the railway company by the Pullman Company shall be paid—one-half by the railway company and one-half by the Pullman Company.

In witness whereof the railway company hath caused its corporate seal to be attached hereto, attested by its president and secretary, and the Pullman Company hath caused its corporate seal to be attached hereto, in like manner attested by its president and secretary.

Dated the day and year first above written.

15 *Citation. Issued September 20, 1886.*

UNITED STATES OF AMERICA,
Eastern District of Louisiana. }

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

PULLMAN SOUTHERN CAR CO.
vs.
CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD CO. } No. 11427.

The President of the United States of America, Greeting, to the Chicago, St. Louis and New Orleans Railroad Company, a corporation incorporated under the laws of the State of Louisiana and having its domicile in the city of New Orleans:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or to deliver your answer to the same in the office of the clerk of the circuit court of the United States, fifth circuit and eastern district of Louisiana, in the city of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the court is held.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 20 day of September, A. D. one thousand eight hundred and eighty-six, and of the Independence of the United States of America the 111th year.

Teste:
[SEAL.] (Signed) E. R. HUNT, *Clerk.*

Marshal's Return.

Received Sep. 20, 1886, by the U. S. marshal, and on the 20th Sept., 1886, I served a true copy of within citation and accompanying plaintiff's petition on the Chicago, St. Louis and New Orleans Railroad Company by handing same to S. B. McConnico, 16 president of said Co., in person, at the office of said comp'y in New Orleans, La., said McConnico being by me known to be president of said Co.

(Signed) R. B. PLEASANTS, *U. S. M'l,*
By DAN. A. ROSE,
D'y U. S. Marshal.

Answer and Demand in Reconvention. Filed Nov. 3, 1886.

U. S. Circuit Court, Eastern District of Louisiana.

Pullman Southern Car Company
vs.
Chicago, St. Louis and New Orleans Railroad Company.
} No. 11427.

The answer and demand in reconvention of the Chicago, St. Louis and New Orleans Railroad Company, made defendant in the above styled and numbered cause.

To the honorable the judges of the United States circuit court sitting in and for the fifth circuit and eastern district of Louisiana:

Now comes into this honorable court The Chicago, St. Louis and New Orleans Railroad Company, defendant in the above
17 styled and numbered cause, and for answer to the petition and demand of the plaintiffs says—

That, save and except such as may hereinafter be admitted to be true, this defendant denies all and singular the averments and allegations contained or set forth in the petition and demand of the plaintiff.

Further answering, defendant says that on or about the 5th day of April, 1879, it entered into an agreement with the plaintiff in the terms and figures set forth in the document filed with the petition, and that on or about the — day of ——, 1879, the plaintiff furnished to this defendant and placed in service on this defendant's road, as provided in said agreement, among others, two certain sleeping cars styled the "Louisiana" and the "Great Northern;" that some time thereafter, to wit, on or about the — day of ——, 1882, the plaintiff removed from service on this defendant's road one of said sleeping cars, to wit, said sleeping car styled "Great Northern," for the purpose of repairing, refitting, and repainting said sleeping car, as provided in said agreement, and that said sleeping car "Great Northern" was removed to the repair shop of said Pullman Company, and the same was never thereafter delivered to this defendant, nor did this defendant ever thereafter have the possession, use, or service of said sleeping car in any manner or form.

Further answering, defendant says that, under the terms of said agreement and in order to give said Pullman Company facilities, conveniences, and space to handle and repair its cars when
18 necessary, a certain substantial building adjoining one of this defendant's depot sheds in the city of New Orleans, to wit, that building forming the corner of Locust and Calliope streets and adjoining the shed which extended from a point 60 feet, more or less, from the corner of Locust street along Calliope street to Magnolia street, was, on or about the — day of ——, 18—, duly set apart by defendant to the exclusive use, occupation, and service of said Pullman Company as a repair shop and for room to store the supplies, materials and implements — said company; which said

building was duly accepted by said Pullman Company and occupied, as aforesaid, to the exclusion of the agents and servants of this defendant; and the said building was kept locked and fastened at night by the said Pullman Company and the keys thereof kept by said Pullman Company's servants, and the agents and servants of this defendant did not have and could not have access or the right of entrance into said building without the consent and permission of the said Pullman Company or its officers.

Further answering, defendant says it was made the duty of said Pullman Company and it so agreed to use the utmost care and precaution in keeping said building clean, in proper order, and secure from fire of whatever kind.

Further answering, defendant says that on or about the 27th day of May, 1882, at or about the hour of 3 o'clock a. m., a fire broke out in the said building so set apart and occupied by said Pullman Company as aforesaid; which said fire increased with tremen-
dous volume and rapidity, and soon communicated to the
19 said depot shed adjoining said Pullman Company's building
aforesaid and totally destroyed and consumed both said Pullman Company's building and the said depot shed adjoining, together with the building containing the superintendent's and telegraph offices of this defendant, at the corner of Magnolia and Calliope streets, with their contents and a large amount of defendant's property, including one new passenger car or coach, and greatly damaged two other cars belonging to defendant, as well as destroying and consuming the two sleeping cars of the plaintiff described in the petition, the amount and value of this defendant's loss and damage by said fire exceeding the sum of ten thousand dollars.

Defendant further says that as soon as said fire was discovered by defendant's agents and servants the alarm was given and every effort was made to extinguish said fire and to save said property from destruction, but that said fire having occurred a short time after midnight and within the building and enclosure of said Pullman Company, and the same being locked and securely fastened, and the keys thereof being in the possession of the servants and employees of said Pullman Company, and there being none of said Pullman Company's servants on the ground or premises or in the vicinity to give access into the interior of said building and enclosure, the same could not be and was not reached, and said fire was not and could not be extinguished in time to save said property from destruction.

Defendant further says it is informed and believes and so charges
that prior to and at the time of said fire and the consequent
20 destruction of the said sleeping cars described in the petition
the said sleeping cars, to wit, the said car "Louisiana" and the said car "Great Northern," were fully insured against loss by fire to the full amount claimed in the petition, to wit, in the sum of thirty-five thousand three hundred dollars, for the benefit of said Pullman Company, and that shortly after the loss and destruction by fire of said sleeping cars as aforesaid said Pullman Company made due proof of loss, and that such loss was by the insurance

companies fully adjusted and paid to said Pullman Company, its assigns, or to some person for its benefit long prior to this suit.

Further answering, defendant says that it is informed and believes that prior to and at the time of said fire one of the said sleeping cars described in the petition, to wit, the said sleeping car "Great Northern," was within the repair shop of said Pullman Company, and the said repair shop was securely locked and fastened at the time of said fire, and the keys thereof were in the possession of said Pullman Company's officers or agents as aforesaid, and that said sleeping car "Great Northern" was not at the time of said fire in the possession of defendant or in its service or use; that the other of said sleeping cars, to wit, the said sleeping car "Louisiana," was housed in the depot shed adjoining said Pullman Company's building as aforesaid at the time of said fire, and the said two sleeping cars, "Louisiana" and "Great Northern," were both destroyed by the said fire originating in the said Pullman Company's building from cause or causes within the control of said Pullman Company, its officers, agents, or servants, and from the negligence of the servants of said
21 Pullman Company and those for whose acts it is legally responsible.

Further answering, defendant says that it specially denies that it is liable or that it covenanted or agreed to be liable for any loss or damage arising from any cause or causes wholly within the control of said Pullman Company or its officers, agents, or servants or for any loss or damage caused by the negligence, the acts, or the unskilfulness of the employees or servants of said Pullman Company in the management, handling, or care of the cars or property of said Pullman Company; and defendant further avers that it was and is the object, intent, and meaning of article seven of said agreement to provide for accident or casualty occurring or liable to occur while said cars were in transit or attached to defendant's trains for transit or transportation or while the same were actually in the employ, use, or service of defendant, and that by the words "accident or casualty" used in said agreement it was not intended to include and did not and does not include loss or destruction by fire, and that, so understanding, intending, and considering said terms, the said Pullman Company specially insured its said cars, and the same were at the time of said fire fully insured against loss by fire to the full amount claimed as value thereof as aforesaid.

Defendant further says that said fire having occurred in the said building so set apart and dedicated to the exclusive use of said Pullman Company, and for the safety and well-being of which said Pullman Company was responsible as aforesaid, and having been caused by the acts of the agents or servants of said Pullman
22 Company, and having arisen from causes wholly within the control of said Pullman Company, defendant is not liable therefor or for any loss or destruction caused thereby.

And defendant further says that by the negligence and carelessness of said Pullman Company, its officers, agents, and servants as aforesaid, defendant has been damaged and has suffered loss in a sum exceeding ten thousand dollars; that none of the said cars, property, or buildings of this defendant destroyed by fire occurring as aforesaid were insured against loss by fire at the time said fire occurred, and that the same were and are now a total loss to this defendant in the sum of ten thousand dollars as aforesaid.

And now this defendant, assuming the position of plaintiff in reconvention, claims and demands of said Pullman Southern Car Company the full sum of ten thousand dollars, with interest thereon according to law, as damages in reconvention for the amount of the property, buildings, and cars damaged and destroyed through the negligence of said Pullman Company, its officers, agents, or servants as aforesaid.

Wherefore, the premises considered, defendant prays that the demand of the plaintiff be rejected with costs, and, assuming the position of plaintiff in reconvention, this defendant prays further that it do have and recover damages in the sum of ten thousand dollars, with legal interest from judicial demand, against said Pullman Southern Car Company for the value of the buildings, cars, and property as aforesaid destroyed by the negligence of said Pullman Company.

Defendant further prays for all proper orders and decrees and for all general and equitable relief. 23

(Signed) FARRAR & SIMONDS,
Att'ys for Defendant.
(Signed) THOS. J. SEMMES,
Of Counsel.

Jury Empanelled and Continuance.

Extract for the Minute Book, November Term, 1886.

NEW ORLEANS, MONDAY, *February* 28, 1887.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

PULLMAN SOUTHERN CAR COMPANY
vs.
CHICAGO, ST. LOUIS AND NEW ORLEANS R. R. CO. } No. 11427.

This cause was called for trial—Farrar & Kruttschnitt, Wm. Burry, George B. Eastin, and Sterling C. Toney appearing for plaintiff, Thomas J. Semmes and Girault Farrar on behalf of the defendant—when the following-named jurors were called and sworn to well and truly try the issue joined herein, to wit: 24

1, Eug. Lalmant; 2, M. J. Robertson; 3, Moses Mann; 4, E. J. Young; 5, F. Varenholt; 6, Jos. L. Montieu; 7, H. St. Armant; 8, C. J. Adolph; 9, A. Grambois; 10, W. H. Price; 11, Geo. B. Welting; 12, Emile Hilborn, and Eugene Lalmant was appointed foreman of the said jury. Thereupon, on the motion of the counsel for the respective parties, the court ordered the said cause to go over until to-morraw at 10.30 a. m.

Hearing and Continuance.

Extract from the Minute Book, November Term, 1886.

NEW ORLEANS, TUESDAY, *March 1st*, 1887.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

PULLMAN SOUTHERN CAR COMPANY
vs.
CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY.
} No. 11427.

25 This cause, as continued from yesterday, was this day resumed, and, the counsel for the respective parties as well as the jurors empanelled in the said cause being all present, the trial was proceeded with. After hearing pleadings and evidence until 3 p. m. the court ordered the cause to go over until to-morrow, Wednesday, the 2nd day of March, A. D. 1887, at 11 a. m.

Plea of Prescription. Filed March 1st, 1887.

United States Circuit Court, Eastern District of Louisiana.

PULLMAN SOUTHERN CAR CO.
vs.
C., ST. L. & N. O. R. R. CO.
} No. 11427.

Now comes The Pullman Southern Car Company, plaintiff herein in the original action and defendant herein in the demand in reconvention for damages filed by the Chicago, St. Louis & New Orleans Railroad Company, and, in bar of the said reconventional demand for damages, pleads the prescription of one year, it appearing upon the face of the said demand in reconvention that the damage as alleged grew out of *quasi* offense said to have been committed by the said Pullman Palace Car Company more than one year prior to the institution of the same demand.

26 Wherefore the said defendant in reconvention prays that this plea may be maintained and the demand in reconvention of the Chicago, St. Louis & New Orleans Railroad Company be dismissed.

(Signed) FARRAR & KRUTTSCHNITT,
STERLING B. TONEY,
HARGIS & EASTIN, *Att'ys.*

Hearing and Continuance.

Extract from the Minute Book, November Term, 1886.

NEW ORLEANS, WEDNESDAY, *March* 2, 1887.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

PULLMAN SOUTHERN CAR COMPANY
vs.
CHICAGO, ST. LOUIS AND NEW ORLEANS R. R. CO. } No. 11427.

This cause, as continued from yesterday, was this day resumed, and, the counsel for the respective parties as well as the jurors empanneled in the said cause being all present, the trial was proceeded with. After hearing arguments from counsel for the parties until 3.30 p. m. the court ordered the cause to go over until to-morrow at 11 a. m.

27 *Hearing and Verdict.*

Extract from the Minute Book, November Term, 1886.

NEW ORLEANS, THURSDAY, *March* 3, 1887.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

PULLMAN SOUTHERN CAR COMPANY
vs.
CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY. } No. 11427.

This cause, as continued from yesterday, was this day resumed, and, the counsel for the respective parties as well as the jurors, empanneled in the cause being all present, the trial was proceeded with. Having received a charge from the court, the jury retired to deliberate upon their verdict. After due deliberation the said jury returned and then and there in open court, through their said foreman, did render and deliver the following verdict, viz:

We, the jury, find a verdict for plaintiff in the sum of nineteen thousand dollars, with legal interest from judicial demand, and deny defendant's reconventional demand.
March 3rd, 1887.
(Signed) EUGENE LALMANT, *Foreman.*

Whereupon it was ordered that the said verdict be recorded, and it is done accordingly.

28 *Agreement of Counsel that Judgment shall not be Signed till after 12th March and for Time to Prepare Bills of Exception. Entered and Filed 5th March*, 1887.

Circuit Court of the United States, Eastern District of Louisiana.

Pullman Southern Car Company
vs.
Chicago, St. Louis and New Orleans Railroad Company.
No. 11427.

It is agreed between the undersigned, counsel of record for the plaintiff and defendant in the above styled and numbered cause, that the judgment herein entered upon the verdict of the jury rendered March 3rd, 1887, shall not be signed until after Saturday, March 12th, 1887.

It is further agreed that both plaintiff and defendant shall have from Saturday, March 4th, 1887, until Saturday, March 12th, 1887, to prepare and submit bills of exception in the said cause.

New Orleans, March 5th, 1887.

(Signed) FARRAR & KRUTTSCHNITT,
Att'ys for Plaintiff.
(Signed) GIRAULT FARRAR, *Att'y for Def'd't.*

Bills of Exception. Filed March 21, 1887.

29 United States Circuit Court, Eastern District of Louisiana.

Pullman Southern Car Company
vs.
C., St. L. & N. O. R. R. Co.
No. 11427.

Defendant's bill of exceptions No 1.

Be it remembered that on the trial of this cause, on the 1st, 2nd, and 3rd days of March, 1887, before the Hon. E. C. Billings, district judge, holding the circuit court, and a jury, on the issues of law and fact raised in the pleadings herein and the admissions therein made, the following facts were substantially shown by the proof adduced:

That the contract sued on and made part of this petition was entered into between the parties, as averred, on the 5th day of April, 1879; that the ten cars mentioned in said contract were furnished to the defendant company and were put into operation on its line of railroad under said contract, among them being the cars "Louisiana" and "Great Northern;" that both of said cars were totally destroyed by fire on the morning of the 27th of May, 1882, at about three o'clock in the morning; that evidence showing their value at that time was adduced; that at the time of said fire the car Louisiana was standing on the tracks of the defendant company in the city of New Orleans, one of the termini of its railroad, under a depot shed belonging to the defendant company and used by it to

store cars when not in actual transit, both cars belonging to it as well as the cars belonging to the Pullman Company, which shed was called by the employees of the defendant company the "Pullman shed;" that said car Louisiana had come from a trip over the line of the defendant road, attached to one of the
30 trains, at 3.15 o'clock in the evening of the 26th of May, and
was placed by the defendant in the said depot shed, where it was usual to place its own and the Pullman cars when not in transit, and that said car was to go out again on another trip, attached to the defendant's train, at 6 o'clock in the evening of the 27th of May, and was to be manned and equipped with the employees of the plaintiff mentioned in the contract sued on and supplied by the defendant with the stores provided for in the contract sued on herein on the day of the 27th and prior to her departure; that at the time of said fire the car Great Northern was standing under the same depot shed—the whole of which was consumed by said fire—but in a different part thereof, to wit, in a part thereof known as the "Pullman repair shop;" that the facts with reference to the "Pullman repair shop" were these: Subsequent to the contract of April 5th, 1879, complaint was made by the Pullman Company to the president of the defendant company of the manner in which repairs were made to the Pullman cars at the defendant's shops in McComb City, a point on the line of the defendant's road about one hundred and five (105) miles above the city of New Orleans, who suggested that the Pullman Co. should repair the cars itself. Thereupon, in order to facilitate the plaintiff in the repair of the said cars furnished under the contract sued on, a part of the passenger car depot shed of the defendant in the city of New Orleans was set apart to the exclusive use and control of the plaintiff, who fitted up that portion assigned to it at its own expense—one part as a linen-room, one as a carpenter shop, one as an upholstery room, and one as a paint shop—and en-
31 closed the same with partitions and kept the same locked and
the keys in the possession of its employees. The employees of the defendant had no right of access to this repair shop. The tracks of the defendant extended into this repair shop, but across these tracks were folding doors, closed by an iron bar on the inside. For the use of this shop the plaintiff did not pay any rent or compensation to the defendant. The watchman over the whole premises was set and maintained by the defendant. With the permission and consent of the defendant, the plaintiff had on one or two occasions repaired and varnished in said shop cars not covered by this contract, but assigned to other railroads.

That the exact spot occupied by the "Great Northern" at the time of the fire was that said car was standing on the tracks of the defendant in the paint shop, enclosed behind the barred folding doors aforesaid; that said car had been in said shop since the month of October, 1881, undergoing repairs, refitting and revarnishing, and during the progress thereof her name had been changed to the "Chatawa;" that she would have been ready to go into transit service on the road on the following day, when properly manned, equipped, and supplied as provided in the contract sued on, if she had not been destroyed on said morning of May 27th, 1882; that there was no evidence that any other car had been placed on the defendant's road in actual transit service in the place of the said car "Great Northern" while she was undergoing said repairs; that at various times during the existence of said contract sued on the

32 plaintiff had taken some of the ten cars furnished thereunder

to the shops in St. Louis, Mo., and Pullman, Illinois, entirely off the line of the defendant's road, in order to be repaired so as to keep them up to the standard required by the contract; that the fire aforesaid which destroyed said depot shed, including the repair shop and cars aforesaid, originated from a cause unknown, about three o'clock in the morning of May 27th, 1882, in the said repair shop.

The question as to negligence on the part of the plaintiff as the cause of the fire was left to the jury specifically, is and was part of the court's instructions, and the jury were instructed by the court that if the fire was caused by the plaintiff's negligence the plaintiff could not recover.

Thereupon counsel for the defendant company requested the court to charge the jury as follows, to wit: "That if the jury believe from the evidence that the defendant company, by arrangement with the plaintiff company, in the year 1879, set apart at their depot in the city of New Orleans a certain portion of said depot for the exclusive use and benefit of plaintiff as a repair shop, wherein the cars of the plaintiff mentioned in the contract sued on were to be repaired by the plaintiff at its own expense, and the said space was enclosed, fastened, and locked, and the keys thereof were kept by the plaintiff or its agents so that access thereto by the defendant or its agents was only such access as was necessary to enable the defendant company to take possession of repaired cars when tendered for service by the plaintiff, and that at the time of the fire, on the 27th of May, 1882, the car Great Northern was in the said repair shop, and

33 had been there for a period exceeding six months, for the

purpose of being repaired, and that at the time of the fire said car had not been tendered for service as a car completely repaired and equipped for service to the defendant, although ready to be tendered, then that the jury must find that the defendant is not liable for the loss of the said car Great Northern or for any damage thereto by fire aforesaid." But the court refused the said instruction, except with the following modification or addition:

"Unless the jury further find that the said car had been withdrawn from the dominion of the contract, and it was held, according to the understanding of both parties, for some other purpose—that is, for some other purpose than those of the contract." To which refusal counsel for defendant, before the jury retired, then and there excepted, and also then and there, before the jury retired, excepted to the said addition or modification.

And thereupon the court also, in its general instruction to the jury, said: "It was undoubtedly competent for the parties to this action to have withdrawn their cars from the dominion of the contract, but to constitute such a withdrawal there must be the intent of the plaintiff to retain them for some purpose other than to continue their use under the contract; and if the jury find that there was a placing of the cars in the separate room or apartment with the intent, on the part of the plaintiff, to use them independently of the contract and not under it, then the defendant would not be liable for their destruction."

34 "If, on the other hand, the jury find that though there was a placing of the cars in the separate room or apartment, but with the intent to continue to use them under the contract, and to hold them so placed merely for the purpose of repair under the contract, and the defendant shared this intent, then the defendant would be responsible for their destruction by fire."

"In determining this question the jury will consider all of the facts and circumstances established, including the fact that the cars remained on the tracks of the defendant, and will further consider whether the defendant is shown to have any relations to these cars except under the contract."

And the defendant's counsel thereupon, then and there, before the jury retired, excepted to said portion of the said general charge and have presented this their bill of exceptions, which is allowed accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Approved.

(Signed) FARRAR & KRUTTSCHNITT, *For Pl'ff.*

United States Circuit Court, Eastern District of Louisiana.

PULLMAN SOUTHERN CAR CO.
vs
C., ST. L. & N. O. R. R. CO.
} No. 11427.

Defendant's Bill of Exceptions No. 2.

35 Be it known and remembered that on the trial of this cause, on the 1st, 2nd, and 3rd days of March, 1887, before the Hon. Edward C. Billings, district judge, holding the circuit court, and a jury, on the issues of law and fact raised in the pleadings herein and the admissions therein made the facts being as set forth in bill of exceptions No. 1.

Thereupon counsel for defendant requested the court to instruct the jury: "That if the jury believe that the two cars, Louisiana and Great Northern, were destroyed by fire at the depot of the defendant company while the said cars were not in actual use and service by the defendant company, then they must find a verdict for the defendant." And the court said: "I refuse that instruction, provided you find that they were being repaired under the contract. That's the test which the court gives you all the way through—whether these cars, according to the meaning of the parties, were or were not under the contract, the contract providing for repairing as well as running."

Thereupon counsel for the defendant then and there excepted to the refusal of the court to instruct as requested, before the jury retired, and also then and there excepted (before the jury retired) to the modification aforesaid, commencing with the words "provided you find that,." &c.

And, further, the court, at the request of the plaintiff's counsel, instructed the jury as follows: "That the said contract covers the said cars while standing on the tracks of the defendant in the yards and under the sheds used for stowing cars while not in transit," saying, "Gentlemen, I add to that, so as to make it clear and the meaning more specific, but while held for transit or repair on
36 defendant's track under the contract; so that the instruction will read: "That said contract covers the said cars while standing on the tracks of the defendant in its yards and under the sheds used for stowing cars while not in transit, but while held for transit or repair on defendant's tracks under the contract." To which instruction counsel for the defendant then and there, before the jury retired, excepted, and have presented *their* their bill of exceptions, which is allowed and signed accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Approved.

(Signed) FARRAR & KRUTTSCHNITT, *For Pl'ff.*

United States Circuit Court, Eastern District of Louisiana.

PULLMAN SOUTHERN CAR CO.
vs. No. 11427.
C., ST. L. & N. O. R. R. CO.

Defendant's Bill of Exceptions No. 3.

Be it known and remembered that on the trial of this cause, on the 1st, 2nd, and 3rd days of March, 1887, before the Hon. Edward C. Billings, district judge, holding the circuit court, and a jury, on the issues of law and fact raised in the pleadings herein and the admissions therein made the facts being as set forth in bill of exceptions No. 1.

Plaintiff's counsel requested the court to instruct the jury as follows: "That a damage or destruction by fire is a casualty
37 or accident within the terms of said contract;" which charge the court then and there, at the request of the said plaintiff's counsel, gave to the jury; whereupon the defendant's counsel, before the jury retired, then and there excepted to the said instruction and have presented this their bill of exceptions, which is allowed and signed accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Approved.

(Signed) FARRAR & KRUTTSCHNITT, *For Pl'ff.*

United States Circuit Court, Eastern District of Louisiana.

PULLMAN SOUTHERN CAR CO.
vs.
C., ST. L. & N. O. R. R. CO.
} No. 11427.

Defendant's Bill of Exceptions No. 4.

Be it known and remembered that on the trial of this cause, on the 1st, 2nd, and 3rd days of March, 1887, before the Hon. Edward C. Billings, district judge, holding the circuit court, and a jury, on the issues of law and fact raised in the pleadings herein and the admissions therein made the facts being as set forth in bill of exceptions No. 1; and the defendant having also offered in evidence two certain policies of insurance issued to the plaintiff by the Royal Insurance Company of Liverpool and London and the London and Lancashire Fire Insurance Company, which said policies are annexed to 38 this bill of exceptions for reference and made a part hereof, and which said policies in and by their terms insured and covered any two sleeping cars of the Pullman Southern Car Company whilst stowed away in the frame depot and sheds of The Chicago, St. Louis and New Orleans Railroad Company, the defendant in this cause, at the corner of Locust and Calliope streets, in the city of New Orleans, against loss by fire to the extent of ten thousand dollars on any one car in case of loss and two thousand dollars on sleeping-car supplies and materials, loss, if any, payable to the Pullman Southern Car Company or its assigns; and defendant having proved that said insurance companies had long prior to this suit paid the said plaintiff the sum of nineteen thousand dollars in full settlement of the loss and damage by fire sustained by said plaintiff on May 27th, 1882, in the destruction by fire of the said cars Louisiana and Great Northern in the said depot and shed insured against in and by the said policies, and the plaintiff having shown that this cause was prosecuted by the plaintiff and the said insurance companies in the name of the plaintiff, under the written agreement hereto annexed and made part of this bill, whereupon the plaintiff's counsel requested the court to instruct the jury as follows: "That the insurance of the said cars by the plaintiff is *res inter alios acta*, which has no determining effect upon the rights of the plaintiff to recover here;" which instruction the court gave to the jury as requested; whereupon the defendant's counsel then and there, before the jury retired, excepted to the court's giving said instruction and have presented this their bill of exceptions, which is allowed and signed accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

39 Approved.
(Signed) FARRAR & KRUTTSCHNITT, *For Pl'ff.*

United States Circuit Court, Eastern District of Louisiana.

PULLMAN SOUTHERN CAR CO.
vs.
C., ST. L. & N. O. R. R. CO. } No. 11427.

Defendant's Bill of Exceptions No. 5.

Be it known and remembered that on the trial of this cause, on the 1st, 2nd, and 3rd days of March, 1887, before the Hon. Edward C. Billings, district judge, holding circuit court, and a jury, on the issues of law and fact raised in the pleadings herein and the admissions therein made, the facts being as set forth in bill of exceptions No. 1, the defendant's counsel requested the court to instruct the jury as follows: "That the contract sued on is void as against public policy, because of the monopoly provision contained in the eleventh stipulation of said contract, and the jury is instructed to find a verdict for the defendant;" which charge the court then and there refused to give to the jury and denied the same, and thereupon the defendant's counsel, before the jury retired, then and there excepted to the refusal of the court to give such instruction to the jury, and have presented this their bill of exceptions, which is allowed and signed accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Approved.
(Signed) FARRAR & KRUTTSCHNITT, *For Pl'ff.*

40 "EXHIBIT A," Annexed to and Made Part of Defendant's Bill of Exceptions No. 4. Filed Mar. 21, 1887.

The Royal Insurance Company (incorporated A. D. 1845) of Liverpool,

No. 2,309,998. $12,000.00.

By this policy of insurance, in consideration of the receipt of one hundred and eighty dollars and the representations, covenants, and warranties of the assured hereinafter named, do insure Pullman Southern Car Company against loss or damage by fire to the amount of twelve thousand dollars, — the property hereinafter described:

$10,000 on sleeping cars contained in the frame depot and sheds of the Chicago, St. Louis and New Orleans Railroad Company, on Calliope and Locust streets, in New Orleans, La., with limit of $10,000 on any one car in case of loss.

$2,000 on sleeping-car supplies, tools, and implements contained in the above-described premises.

Notice of additional concurrent insurance waived.

And the said Royal Insurance Company hereby agree, out of their capital stock and funds, to make good unto the said assured, their executors, administrators, and assigns, all such imme-
41 diate loss or damage not exceeding in amount the sum or sums insured as above specified nor the interest of the as-

sured in the property, except as herein provided, as shall happen by fire to the property so specified from the 21st day of April, one thousand eight hundred and eighty-two, at twelve o'clock at noon, to the 21st day of April, one thousand eight hundred and eighty-three, at twelve o'clock at noon, the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid after due notice and proofs of the same shall have been made by the assured and received at this office in accordance with the terms and provisions of this policy, unless the property be replaced or the company shall have given notice of their intention to rebuild or repair the damaged premises.

1. If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey plan, or description shall be considered a part of this contract and, a warranty by the assured; and if any false representation be made by the assured of the condition, situation, or occupancy of the property; or if there be any omission to make known every fact material to the risk or an overvaluation or any misrepresentation whatever, either in a written application or otherwise; or if the assured shall have or shall hereafter make any other insurance on the property hereby insured or any part thereof without the consent of the company written hereon; or if the above-mentioned premises
42 shall be occupied or used so as to increase the risk or the risk
be increased by the erection or occupation of neighboring buildings or by any means whatever within the control of the assured without the assent of this company endorsed hereon; or if it be a manufacturing establishment, running, in whole or in part, over or extra time or running at night; or if the property be sold or transferred or any change take place in title or possession (except in case of succession by reason of the death of the assured), whether by legal process or judicial decree or by voluntary transfer or conveyance; or if this policy shall be assigned before a loss without the consent of the company indorsed hereon; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in this policy; or if the assured shall keep gunpowder, fire-works, nitro-glycerine, phosphorus, saltpetre, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid or chemical oils or other articles subject to legal restrictions, without written permission in this policy, then and in every such case this policy shall be void.

2. This insurance does not apply to or cover jewels, plate, watches, musical or scientific instruments (piano-fortes in dwellings excepted), ornaments, medals, patterns, printed music, printed books, engravings, paintings, picture frames, sculpture, casts, models, or curiosities, unless particularly specified in this policy.
This company shall not be liable by virtue of this
43 policy for any loss by theft at or after a fire, nor for money or
bullion, bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind, nor for loss or damage by fire hap-

pening during the existence of any invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law within the country or locality in which the property insured is situated, unless proof be made to the satisfaction of the directors that such loss or damage was not occasioned by or connected with but occurred from a cause or causes independent of the existence of such invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law; and this policy does not cover loss or damage occasioned by or through any earthquake or hurricane nor goods destroyed or damaged while undergoing any process by which the application of fire-heat is necessary, nor any loss in or on buildings unprovided with good and substantial stone or brick chimneys, the absence of which has been the cause of the fire, nor loss resulting from any neglect of or deviation from the laws or regulations of the police, where such exist, nor any loss caused by the explosion of gunpowder or any explosive substance, nor by lightning or explosions of any kind unless fire ensues, and then for the loss or damage by fire only, which loss shall be determined by the value of the damaged property after the casualty by explosion or lightning.

3. If a building shall fall, except as a result of a fire, all
44 insurance by this company on its contents shall immediately
cease and determine.

4. If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured or if the building insured stands on leased ground, unless the lease be perpetual, it must be so represented to the company and so expressed in the written part of this policy; otherwise the policy shall be void. When property has been sold and delivered or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate. Goods held on storage or in trust or on commission must be so described and declared at the time of effecting such insurance, and must be separately and specifically insured; otherwise this policy will not extend to cover such property.

5. The best endeavors of the assured shall be used in saving and protecting the property from damage at and after the fire, and in case of failure so to do this company will not be liable for damage caused by such failure, and there can be no abandonment to the company of the property insured.

The use of general terms or anything less than a distinct, specific agreement clearly expressed and endorsed on this policy shall not be construed as a waiver of any printed or written condition or restriction therein.

6. In case of any other insurance upon the property hereby in-
sured, whether made prior or subsequent to the date of this
45 policy, whether valid or not valid, and whether concurrent
with this policy or otherwise, the assured shall be entitled to
recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount in-

sured thereon; and it is hereby declared and agreed that in case of the assured holding any other policy in this or any other company on the property insured or any part thereof, subject to the conditions of average, this policy shall be subject to average in like manner.

Reinsurance, in case of loss, to be settled in proportion as the sum reinsured shall bear to the whole sum covered by the reinsured company.

When property insured under this policy is damaged by removal from a building exposed to loss by fire such damage shall be borne by the company in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form required by this policy shall be made by the claimant so insured.

7. This insurance may be terminated at any time at the request of the assured, in which case the company shall retain the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time at the option of the company on giving notice to that effect and refunding a rateable proportion of the premium, if the same has been actually paid, for the unexpired term of the policy.

8. All persons insured by this company sustaining any loss or damage by fire shall immediately give notice to the company or
their agents and within fourteen days after such loss or dam-
46 age has occurred shall deliver in as particular an account of
their loss or damage as the nature of the case will admit of
and make proof of the same by their declaration or affirmation and by their books of account or such other proper evidence as the directors of this company or their agents may reasonably require; and until such declaration or affirmation, account, and evidence be produced the amount of such loss or any part thereof shall not be payable or recoverable. No profit nor advantage of any kind is to be included in such claim, and if there appear fraud in the claim made for such loss or false declaring or affirming in support thereof the claimant shall forfeit all benefit under the policy.

9. On the happening of any damage by fire to any building or place or property or effects within any building or place, in respect of which a claim is or may be made under this policy, the company, without being deemed wrongdoers, may, by their authorized officers and servants or others, enter into and for a reasonable time remain in possession of such building or place, property or effects, for all reasonable purposes relating to or in connection with the insurance hereby effected, and this policy shall be evidence of leave and license and authority for that purpose.

10. Persons insured by this company and who may suffer loss will receive their indemnity without deduction or discount; but in every case of loss the company will reserve to themselves the right of reinstatement in preference to the payment of claims if they shall
judge the former course to be most expedient.

47 11. If any difference shall arise with respect to the amount
of any claim for loss or damage by fire and no fraud sus-

pected such difference shall be submitted to arbitrators, indifferently chosen, whose award, or that of the umpire, shall be conclusive.

12. This insurance, the risk not being changed, may be continued for such further time as shall be agreed on, provided the premium therefor is paid and indorsed on this policy or a receipt given for the same, and it shall be considered as continued under the original representation and for the original amounts and divisions, unless otherwise specified in writing; but in case there shall have been any change in the risk, either within itself or by neighbouring building, not made known to the company by the assured at the time of renewal, this policy and renewal shall be void.

13. This company shall not be liable by virtue of this policy or any renewal thereof until the premium be paid or a valid receipt given therefor, duly impressed with the seal of the company. It is furthermore hereby provided and mutually agreed that if the premium on this insurance shall be paid to any other person or persons other than the duly appointed and authorized agent of this company such payment shall be at the sole risk of the assured, and this policy shall not be binding upon the company until the receipt by them or their duly authorized agent of such premium. It is further agreed that if this policy has been procured by any person or persons other than the duly appointed and authorized
48 agent of this company such person or persons shall be deemed to be the agent of the assured and not of this company in any act or representation prior to the delivery of this policy and the actual receipt of the premium therefor by this company.

14. It is furthermore hereby expressed, provided, and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided nor unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

15. In all cases of loss the assured shall assign to this company all his right to receive satisfaction therefor from any other person or persons, town or corporation, with a power of attorney to sue for and recover the same at the expense of this company.

16. The directors of the company shall not be sued nor made personally responsible for this insurance until the funds of the company are first exhausted, and the agents shall in no case be responsible, either on account of any legal or other investigation which they may find it necessary to institute for the satisfaction of the company, nor can their personal property be attached on account of any legal loss by the assured.

49 Kerosene.—The use of refined kerosene oil when of the standard of 110 degrees Fahr. quality for lights only in stores and dwellings is permitted, provided the same be drawn and the

lamps filled and trimmed by daylight only and without the use of artificial light.

Gas.—The generating or evaporating within the building or contiguous thereto of any substances for a burning gas or the use of gasoline and similar fluids for lighting is prohibited under this policy unless permitted in writing hereon.

Fences and other yard fixtures, also store furniture and fixtures, are not covered by insurance on the building, but must be separately and specifically insured.

Glass doors and windows, when plates are of the dimensions of three square feet and more, are not covered by this policy unless separately and specifically insured.

Frescoed work or gilding on walls or ceilings is not covered by insurance on the building, but must be separately and specifically insured.

Builders' risk.—The working of carpenters, roofers, tinsmiths, gas-fitters, plumbers, or other mechanics in building, altering, or repairing the premises named in this policy will vitiate the same unless permission for such work be indorsed in writing hereon, excepting in dwelling-houses only, where five days are allowed in any one year for incidental repairs without notice or endorsement.

50 And it is hereby understood and agreed by and between this company and the assured that this policy is made and accepted in reference to the foregoing terms and conditions, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for in writing.

In witness whereof we, two of the directors of the said company, by our authorized attorneys, have hereunto set our hands and have caused the common seal of the said company to be hereunto affixed.

Dated, at Louisville, this 21st day of April, in the year of our Lord one thousand eight hundred and eighty-two, and issued there.

(Signed) R. BROCKLEBANK,
D. DUNCAN, *Directors*,
By their attorneys, BARBEE & CASTLEMAN, [SEAL.]
Agents to the said Company.

EXHIBIT "A" 1, Annexed to and Made Part of Defendant's Bill of Exceptions No. 4. Filed Mar. 21, 1887.

London and Lancashire (registered) Fire Insurance Company,

No. 981,373. $12,000.00.

51 By this policy of insurance, in consideration of the receipt of one hundred and eighty dollars and the representations, covenants, and warranties of the assured hereinafter named, do insure Pullman Southern Car Company against loss or damage by fire to the amount of twelve thousand dollars, — the property hereinafter described :

$10,000 on sleeping cars contained in the frame depot and sheds of the Chicago, St. Louis and New Orleans Railroad Company on Calliope and Locust streets, in New Orleans, La., with limit of $10,000 on any one car in case of loss.

$2,000 on sleeping-car supplies, tools, and implements contained in the above-described premises.

Notice of additional concurrent insurance waived.

And the said London and Lancashire Fire Insurance Company hereby agree, out of their capital stock and funds, to make good unto the said insured, their executors, administrators, and assigns, all such immediate loss or damage not exceeding in amount the sum or sums insured as above specified, nor the interest of the insured in the property, except as herein provided, as shall happen by fire to the property so specified from the 21st day of April, one thousand eight hundred and eighty-two, at twelve o'clock at noon, to the 21st day of April, one thousand eight hundred and eighty-three, at twelve o'clock at noon; the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss and to be paid after due
52 notice and proofs of the same shall have been made by the insured and received at this office, in accordance with the terms and provisions of this policy, unless the property be replaced or the company shall have given notice of their intention to rebuild or repair the damaged premises.

Sum insured, $12,000.

1. If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered as a part of this contract and a warranty by the insured; and if any false representation be made by the insured of the condition, situation, or occupancy of the property; or if there be any omission to make known every fact material to the risk or an overvaluation or any misrepresentation whatever, either in a written application or otherwise; or if the insured shall have or shall hereafter make any other insurance on the property hereby insured or any part thereof without the consent of the company written hereon; or if the above-mentioned premises shall be occupied or used so as to increase the risk, or the risk be increased by the erection or occupation of neighboring buildings or by any means whatever within the control of the insured without the assent of this company indorsed hereon; or if it be a manufacturing establishment, running, in whole or in part, over or extra time or running at night; or if the property be sold or transferred or any change take place in title or possession (except in case of succession by reason of the death of the insured), whether by legal process or judicial decree or by voluntary transfer or conveyance; or if this policy
53 shall be assigned before a loss without the consent of the company endorsed hereon; or if the interest of the insured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in this policy; or if the insured shall keep gunpowder, fire-works, nitro-glycerine, phosphorus, saltpetre, nitrate of soda, petroleum, naphtha, gasoline,

Time, one year.

benzine, benzole, or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid or chemical oils or other articles subject to legal restrictions, without written permission in this policy, then and in every such case this policy shall be void.

2. This insurance does not apply to or cover jewels, plate, watches, musical or scientific instruments (piano-fortes in dwellings excepted), ornaments, medals, patterns, printed music, printed books, engravings, paintings, picture frames, sculpture, casts, models, or curiosities, unless particularly specified in this policy. This company shall not be liable by virtue of this policy for any loss by theft at or after a fire, nor for bullion, bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind, nor for loss
Rate, 1½. or damage by fire happening during the existence of any
invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power, or martial law within the country or locality in which the property insured is situated, unless proof be made to the satisfaction of the directors that such loss or damage was not occasioned by or connected with but occurred from a cause or causes independent of the existence of such invasion, foreign enemy, rebellion, insurrection, riot, civil commotion,
54 military or usurped power, or martial law; and this policy
does not cover loss or damage occasioned by or through any earthquake or hurricane, nor goods destroyed or damaged while undergoing any process by which the application of fire-heat is necessary, nor any loss in or on buildings unprovided with good and substantial stone or brick chimneys, the absence of which has been the cause of the fire, nor loss resulting from any neglect of or deviation from the laws or regulations of the police, where such exist, nor any loss caused by the explosion of gunpowder or any explosive substance, nor by lightning or explosions of any kind, unless fire ensues, and then for the loss or damage by fire only, which loss shall be determined by the value of the damaged property after the casualty by explosion or lightning.

3. If a building shall fall, except as a result of a fire, all insurance by this company on it or its contents shall immediately cease and determine.

4. If the interest of the insured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the insured, or if the building insured stands on leased ground, unless the lease be perpetual, it must be so represented to the company and so expressed in the written part of this policy; otherwise the policy shall be void. When property has been sold and delivered or otherwise disposed of, so that all interest or liability on the part of the insured herein named has ceased, this insurance on such property shall immediately terminate. Goods held on storage or in trust or on commission must be so de-
55 scribed and declared at the time of effecting such insurance
and must be separately and specifically insured; otherwise this policy will not extend to cover such property.

5. The best endeavors of the insured shall be used in saving and protecting the property from damage at or after the fire, and in case

of failure so to do this company will not be liable for damage caused by such failure, and there can be no abandonment to the company of the property insured.

The use of general terms or anything less than a distinct, specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein.

Premium, $180.00.

6. In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, whether valid or not valid, and whether concurrent with this policy or otherwise, the insured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, and it is hereby declared and agreed that in case of the insured holding any other policy in this or any other company on the property insured or any part thereof, subject to the conditions of average, this policy shall be subject to average in like manner.

Reinsurance in case of loss to be settled in proportion as the sum reinsured shall bear to the whole sum covered by the reinsured company.

56 When property insured under this policy is damaged by removal from a building exposed to loss by fire such damage shall be borne by the company in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof, in due form required by this policy, shall be made by the claimant so insured.

7. This insurance may be terminated at any time at the request of the insured, in which case the company shall retain the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time, at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium, if the same has been actually paid, for the unexpired term of the policy.

8. All persons insured by this company sustaining any loss or damage by fire shall immediately give notice to the company or their agents, and within fourteen days after such loss or damage has occurred shall deliver in as particular an account of their loss or damage as the nature of the case will admit of, and make proof of the same by their declaration or affirmation and by their books of accounts or such other proper evidence as the directors of this company or their agents may reasonably require, and until such declaration or affirmation, account, and evidence be produced the amount of such loss or any part thereof shall not be payable or recoverable. No profit nor advantage of any kind is to be included in such claim, and if there appear fraud in the claim made for such loss or
57 false declaring or affirming in support thereof the claimants shall forfeit all benefit under the policy.

9. On the happening of any damage by fire to any building or place, or property or effects within any building or place, in respect of which a claim is or may be made under this policy, the company, without being deemed wrongdoers, may, by their authorized officers

and servants or others, enter into and for a reasonable time remain in possession of such building or place, property, or effects for all reasonable purposes relating to or in connection with the insurance hereby effected, and this policy shall be evidence of leave and license and authority for that purpose.

10. Payment of any loss or damage shall be made within 60 days after satisfactory proof thereof shall have been made to the company in accordance with the conditions of this policy; and in every case of loss the company shall reserve to itself the right of reinstatement in preference to the payment of the claims if it shall judge the former course to be most expedient.

11. If any difference shall arise with respect to the amount of any claim for loss or damage by fire and no fraud suspected, such difference shall be submitted to arbitrators, indifferently chosen, whose award, or that of the umpire, shall be conclusive.

12. This insurance, the risk not being changed, may be continued for such further time as shall be agreed on, provided the premium
therefor is paid and indorsed on this policy or a receipt
58 given for the same, and it shall be considered as continued
under the original representation and for the original amounts and divisions unless otherwise specified in writing; but in case there shall have been any change in the risk, either within itself or by neighboring buildings, not made known to the company by the insured at the time of renewal, this policy and renewal shall be void.

13. This company shall not be liable by virtue of this policy or any renewal thereof until the premium be paid or a valid receipt given therefor, duly impressed with the seal of the company. It is furthermore hereby provided and mutually agreed that if the premium on this insurance shall be paid to any person or persons other than the duly appointed and authorized agent of this company, such payment shall be at the sole risk of the insured, and this policy shall not be binding upon the company until the receipt by them or their duly authorized agent of such premium. It is further agreed that if this policy has been procured by any person or persons other than the duly appointed and authorized agent of this company, such person or persons shall be deemed to be the agent of the insured and not of this company in any act or representation prior to the delivery of this policy and the actual receipt of the premium therefor by this company.

14. It is furthermore hereby expressed, provided, and mutually agreed that no suit or action against this company for the recovery
of any claim by virtue of this policy shall be sustainable in
59 any court of law or chancery until after an award shall have
been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

15. In all cases of loss the insured shall assign to this company all his right to receive satisfaction therefor from any other person or persons, town or corporation, with a power of attorney to sue for and recover the same at the expense of this company.

16. The directors of the company shall not be sued, either individually or collectively, nor made personally responsible for this insurance, but it is hereby expressly stipulated and agreed that neither the directors nor any other proprietor or holder of shares in the said company shall individually, in any manner, be, or by any process of law or equity, made liable to make good any such claims or demands beyond his, her, or their contribution to the capital of said company of the full amount of his, her, or their share in such capital; and the agents shall in no case be responsible, either on account of any legal or other investigation which they may find it necessary to institute for the satisfaction of the company, nor can their personal property be attached on account of any alleged loss by the insured.

60 Kerosene.—The use of refined kerosene oil, when of the standard of 110 degrees Fahr. quality, for lights only in stores and dwellings, is permitted, provided the same be drawn and the lamps filled and trimmed by daylight only, and without the use of artificial light.

Gas.—The generating or evaporating within the building or contiguous thereto of any substances for burning gas or the use of gasoline and similar fluids for lighting is prohibited under this policy, unless permitted in writing hereon.

Fences and other yard fixtures, also store furniture and fixtures, are not covered by insurance on the building, but must be separately and specifically insured.

Glass doors and windows, when plates are of the dimensions of three square feet and more, are not covered by this policy, unless separately and specifically insured.

Frescoed work or gilding on walls or ceilings is not covered by insurance on the building, but must be separately and specifically insured.

Builders' risk.—The working of carpenters, roofers, tinsmiths, gas-fitters, plumbers, or other mechanics in building, altering, or repairing the premises named in this policy will vitiate the same unless permission for such work be indorsed in writing hereon, excepting in dwelling-houses only, where five days are allowed in any one year for incidental repairs without notice or endorsement.

And it is hereby understood and agreed by and between
61 this company and the insured that this policy is made and
accepted in reference to the foregoing terms and conditions, which are hereby declared to be a part of this contract and are to be used and resorted to in order to determine the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for in writing.

This policy shall not be valid unless countersigned by the duly authorized agent of the said London and Lancashire Fire Insurance Company at Louisville, Ky.

In witness whereof we, two of the directors of the said company, by our authorized attorneys, have hereunto set our hands and have caused the common seal of the said company to be hereunto affixed. Dated, at Louisville, this 21st day of April, in the year of our Lord one thousand eight hundred and eighty-one, and issued there.

(Signed) E. HARRISON,
E. MUSGROVE, *Directors*,
By their attorneys, BARBEE & CASTLEMAN, [SEAL.]
Agents to the said Company.

Countersigned, at Louisville, Ky., this 21st day of April, 1882.
(Signed) BARBEE & CASTLEMAN, *Agents.*

Plaintiff's Exhibit Annexed to and Made Part of Bill of Exceptions No. 4. Filed Mar. 21, 1887.

62 It is agreed that whatever may be recovered by suit or received in settlement or compromise by the Pullman Southern Car Company or by the Royal Insurance Company or by the London & Lancashire Fire Insurance Company from the Chicago, St. Louis & New Orleans railroad or other company upon or by reason of or for the sleeping cars Louisiana and Great Northern or either of them shall be divided between the said Pullman Company and said two insurance companies, the Pullman Company to receive one-half and the said insurance companies the other half. The expenses and costs of such suits or compromise efforts are to be borne one-half by the Pullman Company and the other half by said two insurance companies; and the said Pullman Company agrees to bring suit in the premises for the Louisiana and also such suit, if any, for the Great Northern as may be agreed on by the parties hereto and to prosecute such suit or suits to final conclusion unless settled by agreement of parties hereto or unless a compromise is made by consent of the parties hereto, said suit or compromise to be conducted through the joint counsel of said Pullman Company and said insurance companies.

(Signed) PULLMAN SOUTHERN CAR CO.,
By O. A. LOCHRANE, *Gen'l Counsel.*
ROYAL INSURANCE CO.,
By BARBEE & CASTLEMAN, *Ag'ts.*
LONDON & LANCASHIRE FIRE INS. CO.,
By BARBEE & CASTLEMAN, *Ag'ts.*

Oct'r 27th, 1883.

COUNTY OF JEFFERSON, } *ss:*
State of Kentucky, }

63 I, Charles A. Wilson, a notary public in and for the county and State aforesaid, hereby certify that the foregoing instrument of writing is a true and correct copy of a paper this day exhibited to me endorsed by writing and stamping in words and figures as follows, to wit:

"No. 11427. United States circuit court, eastern district of Louisiana. Exhibit offered by pl'ffs and filed March 1, 1887. T. McC. Hyman, d'y clerk."

Witness my hand and notarial seal this 17th day of March, 1887.

[SEAL.] (Signed) CHARLES A. WILSON,
Notary Public, Jefferson Co., Ky.

Judgment.

Extract from the Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana. November Term, 1886.

64 NEW ORLEANS, THURSDAY, *March* 3, 1887.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

PULLMAN SOUTHERN CAR COMPANY
vs.
CHICAGO, ST. LOUIS & NEW ORLEANS R. R. CO. } No. 11427.

By reason of the verdict of the jury herein and in accordance therewith it is ordered, adjudged, and decreed that the plaintiffs, The Pullman Southern Car Company, do have and recover of and from the defendants, The Chicago, St. Louis and New Orleans Railroad Company, the sum of nineteen thousand dollars ($19,000.00), with 5% interest per annum thereon from judicial demand, to wit, September 20th, 1886, until paid, and costs.

It is further ordered, adjudged, and decreed that upon the reconventional demand of the said defendants there be judgment for the said plaintiffs, The Pullman Southern Car Company, rejecting said reconventional demand, with costs.

Judgment rendered March 3, 1887.
Judgment signed March 22, 1887.
(Signed) EDWARD C. BILLINGS, *Judge.*

65 *Motion and Order for Writ of Error to Operate as Supersedeas. Entered and Filed 25 March, 1887.*

Circuit Court of the United States, Fifth Judicial Circuit, Eastern District of Louisiana.

PULLMAN SOUTHERN CAR COMPANY
vs.
CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY. } No. 11427.

Motion and order for writ of error to operate as supersedeas.

On motion of Thos. J. Semmes and Girault Farrar, of counsel for The Chicago, St. Louis and New Orleans Railroad Company, defendant in the above styled and numbered cause;

And on suggesting to the court that there is error in the judgment rendered in this cause on the 3rd day of March, 1887, and signed on the 22nd day of March, 1887, to the injury of the defendant;

And on further suggesting that the defendant company desires to obtain a writ of error to operate as a supersedeas—

It is ordered that a writ of error be allowed said Chicago, St. Louis and New Orleans Railroad Company, the defendant, the same to operate as a supersedeas, on its giving bond, with good and solvent surety, conditioned as the law directs, in the sum of twenty-five thousand dollars, said writ of error to be made returnable to the Supreme Court of the United States, at Washington, on the second Monday of October next.

(Signed) EDWARD C. BILLINGS, *Judge.*

66 *Bond for Writ of Error. Filed March* 25, 1887.

Know all men by these presents that we, the Chicago, St. Louis and New Orleans Railroad Company, as principal, and the Illinois Central Railroad Company, as surety, are held and firmly bound unto the Pullman Southern Car Company in the full and just sum of twenty-five thousand dollars, to be paid to the said Pullman Southern Car Company, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixteenth day of March, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately, at a circuit — of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, in a suit depending in said circuit court, wherein the said Pullman Southern Car Company was plaintiff and the said Chicago, St. Louis and New Orleans Railroad Company was defendant, judgment was rendered against the said Chicago, St. Louis and New Orleans Railroad Company, defendant, and the said Chicago, St. Louis and New Orleans Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Pullman Southern Car Company, citing and admonishing it to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

67

Now, the condition of the above obligation is such that if the said Chicago, St. Louis and New Orleans Railroad Company shall prosecute said writ to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY,
By JAS. C. CLARKE, *Pres't.* [L. S.]
ILLINOIS CENTRAL RAILROAD COMPANY,
By JAS. C. CLARKE, *Pres't.* [L. S.]

Approved as to bond and surety.
(Signed) FARRAR & KRUTTSCHNITT, *Att'ys Pl'ff.*

Attest.
[SEAL.] (Signed) JOHN DUNN, *Ass't Sec'y.*

Approved.
(Signed) EDWARD C. BILLINGS, *Judge.*

Extract from the Minutes of the Meeting of the Board of Directors of the Illinois Central Railroad Co. Filed March 25, 1887.

"The president reported that in the case of The Pullman Southern Car Company *vs.* Chicago, St. Louis and New Orleans Railroad Company, No. 11427, in the United States circuit court of 68 Louisiana, a judgment has been rendered against the defendant, and it has appealed or applied for a writ of error to the Supreme Court of the United States, and the appeal or writ of error bond has been fixed at $25,000, and that he had, as president of this company and in its name, signed said bond as surety of the Chicago, St. Louis and New Orleans Railroad Company; whereupon it was, on motion—

Resolved, That this company hereby ratifies and approves the same and agrees to be bound by the terms of said bond as surety of said Chicago, St. Louis & New Orleans R. R. Co., and that the president is authorized to sign the name of this company and bind it as surety of said Chicago, St. Louis & New Orleans R. R. Co. to any other bond that is or may be necessary in said cause."

I certify that the above is a true extract from the minutes of the meeting of the board of directors of the Illinois Central Railroad Company held in New York the 16th day of March, 1887.
[SEAL.] (Signed) E. T. H. GIBSON, *Secretary.*

69 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 68 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of The Pullman Southern Car Company *vs.* The Chicago, St. Louis and New Orleans Railroad Company, No. 11427 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 7 day of July, A. D. 1887.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 7 day of July, A. D. 1887.

EDWARD C. BILLINGS, *Judge.*

70 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the eastern district of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Pullman Southern Car Company and the Chicago, St. Louis and New Orleans Railroad Company, a manifest error hath happened, to the great damage of the said Chicago, St. Louis and New Orleans Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 25 day of March, in the year of our Lord one thousand eight hundred and eighty-seven.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT,
Clerk of the United States Circuit Court
for the Eastern District of Louisiana.

71 [Endorsed:] United States circuit court. No. 11427. Chicago, St. Louis and New Orleans Railroad Company, plaintiffs in error, *versus* Pullman Southern Car Company, defendant in error. No. —. U. S. circuit court, eastern district of Louisiana. Filed March 25, 1887. E. R. Hunt, clerk.

72 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to the Pullman Southern Car Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein The Chicago, St. Louis and New Orleans Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Chicago, St. Louis and New Orleans Railroad Company, as in said writ mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 26 day of March, in the year of our Lord one thousand eight hundred and eighty-seven.

EDWARD C. BILLINGS, *Judge.*

73 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 11427. Chicago, St. Louis and New Orleans Railroad Company, plaintiff in error, *vs.* Pullman Southern Car Company, defendant in error. Citation. No. —. U. S. circuit court, eastern district of Louisiana. Filed March 26, 1887. E. R. Hunt, clerk.

Marshal's Return.

Rec'd M'ch 26, 1887, & on the 26th day of March, 1887, I served duplicate of the within citation in error on The Pullman Southern Car Company, defendants in error herein, by handing same to Mr. E. B. Kruttschnitt, in person, of the firm of Farrar & Kruttschnitt, attornies of record of said Pullman Southern Car Company.

Said service made this day in the city of New Orleans.

R. B. PLEASANTS, *U. S. M'l.*
JOHN BAKER, *Dep'ty U. S. Mar.*

I, John Baker, being duly sworn, do depose and say that I am the lawful deputy of R. B. Pleasants, U. S. marshal of the eastern dist. of La., and that the service as above stated was made by me & is correctly stated.

JOHN BAKER.

Sworn to & subscribed before me this 26th day of March, 1887.

E. R. HUNT,
U. S. Commissioner.

Endorsed on cover: E. Louisiana C. C. U. S. No. 118. The Chi- ., St. Louis & New Orleans Railroad Company, plaintiff in error, *vs.* The Pullman Southern Car Company. Filed September 27, 1887.

Supreme Court
FILED
NOV 13 1890
JAMES H. McKENNE
Cl

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 118.

THE CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY, PLAINTIFF IN ERROR,

versus

THE PULLMAN SOUTHERN CAR COMPANY, DEFENDANT IN ERROR.

Error to the Circuit Court of the United States for the Eastern District of Louisiana.

BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR.

GIRAULT FARRAR,
THOS. J. SEMMES,
JAMES FENTRESS,
Of Counsel for Plaintiff in Error.

T. H. Thomason, Printer, 36 Natchez Street.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 118.

THE CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY, Plaintiff in Error,

versus

THE PULLMAN SOUTHERN CAR COMPANY, Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Louisiana.

BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR.

Statement of the Case.

This is an action *ex contractu* brought by the Pullman Southern Car Company, the defendant in error, against the Chicago, St. Louis and New Orleans Railroad Company, plaintiff in error, to recover the sum of $35,300, the alleged damage to two sleeping cars of the defendant in error, the "Louisiana" and the "Great Northern," by fire, on May 27th, 1882, while in the alleged possession and control of the plaintiff in error, for which loss and damage the plaintiff in error is charged to be liable, under the provisions of a contract in writing entered into between the parties on April 5th, 1879. Rec. pp. 1, 2, 3.

The plaintiff in error set up the general issue, and further in defense set up that it was not liable for such loss by fire under the terms of the contract and under the facts of the case; that the contract provided only for a running or hauling arrangement on the part of the Railway Company; that its responsibility for "accident or casualty" attached by the provisions of the contract only to the sleeping cars of the defendant in error, while said cars were in the use or service of the plaintiff in error; that the cars "Louisiana" and "Great Northern" were not in the use or service of the plaintiff in error at the time of their loss, but were stowed away, out of service, one of them in a depot shed adjoining the Pullman Repair Shop, and the other in the said Pullman Repair Shop; that the Pullman Company, so understanding and considering the terms and conditions of said contract, specially insured its cars against "loss by fire," and, at the time of the said fire, the said two sleeping cars thus stowed away out of service, were fully covered by insurance against "loss by fire," and the Pullman Company had long since collected the full amount of its loss so insured against; that the said fire occurred after midnight within the said Repair Shop of the Pullman Company, which was locked and barred, the keys in possession of the Pullman Company's servants, none of whom were on the ground or in the vicinity of said fire, and the plaintiff in error having no right of access (or means of entrance) into the said repair shop; that the said fire arose from cause or causes wholly within the control of the defendant in error and from the acts of the Pullman servants and those for whose acts the defendant in error was legally responsible.

The plaintiff in error, thereupon, set up a reconventional demand (cross action) against the Pullman Company, for damages sustained by the Railway Company in the loss of certain cars, coaches and buildings, the property of the Railway Company, destroyed by said fire, originating, as charged, in the said Pullman Repair Shop and by the negligence of said Pullman Company. Rec. pp. 9, 10, 11, 12.

The defendant in reconvention (cross action), the Pullman Company, filed the plea of prescription of one year in bar of all damages set up in the reconventional demand. Rec. p. 13.

The cause was tried before the Circuit Court and a Jury, upon the issues of law and fact raised by the pleadings, and the instructions of the Court, and there was a verdict for the defendant in error in the sum of $19,000; with legal interest from judicial demand on the original action, and a verdict for the defendant in error on the reconventional demand, and judgment by the Court on the verdict. Rec. pp. 14, 15, 16, 33.

The Railway Company, plaintiff in error, thereupon sued out this writ of error.

In order that the Court may grasp the facts of this cause, and the relations of the parties, it is necessary to set forth first, the several provisions and stipulations of the written contract, and then, the facts as they appear in the Bills of Exceptions taken at the trial.

The Contract.

The contract after reciting that:

"*Whereas*, the Pullman Company is now engaged in the business of operating railway cars know as Drawing Room Cars and Sleeping Cars, under certain patents belonging to it, and of hiring the same to railway companies under written contracts for a term of years, to be used and employed on and over the lines of the roads of said railway companies, and receiving therefrom income and revenue by the sale to passengers of seats, berths and accommodations therein; and *whereas* the Railway Company is desirous of availing itself of the use on and over its lines of road of the cars constructed under the sleeping and drawing room car patents now the property of the Pullman Company, and also of connections by means of said cars with other lines of railway, whereon said cars are now operated by the Pullman Company," provides in fourteen sections the respective rights and obligations of the parties, as follows:

1st. The Pullman Company agrees "that it will furnish drawing room cars and sleeping cars to be used by the Railway Company for the transportation of passengers, sufficient to meet the requirements of travel on and over its line of railway, and on and over all lines of railway which it now controls or may hereafter control by ownership, lease or otherwise, said cars to be satisfactory to the General Manager or Superintendent of the Railway Company; the cars so furnished to be in part the cars now operated on the lines of the Railway Company, namely, Autocrat, Bolivar, Great Northern, Grenada, Jackson, La Branche, Louisiana, Natchez, Norman, Templar."

2d. The Pullman Company "agrees at its own proper cost and expense to furnish one or more employees, as may be needful, upon each of said cars, whose duty shall be to collect fares for the accommodation furnished in said cars, and generally to wait upon passengers therein and provide for their comfort."

3d. The Railway Company agrees to allow free passes to general officers of the Pullman Company and employees named in Article Second over its lines of railway, when on duty for the Pullman Company.

4th. The Pullman Company agrees to allow free passes to the general officers of the Railway Company in any of the cars furnished by the Pullman Company under this contract.

5th. Agreement "that the said employees named in Article Second of this contract shall be governed by and subject to the rules and regulations of the Railway Company which are or may be adopted from time to time, for the government of its own employees," and in the event of injury or death of any Pullman employee, the Railroad Company to be responsible only to the extent of its liability to its own employee for the same accident, and for all liability in excess thereof to be indemnified by the Pullman Company.

6th. "In consideration of the use of the aforesaid cars the Railway Company hereby agrees to haul the same on the passenger trains on its own line of road, and on all roads which it now controls or may hereafter control by ownership, lease or otherwise, and also on all passenger trains on which it may, by virtue of contracts or running arrangements with other roads, have the right to use such cars in such manner as will best accommodate passengers desiring the use of said cars. The Railway Company shall, at its own expense, furnish and apply the necessary lubricating material, provide ice, fuel and material for lights, and shall wash and cleanse all cars furnished under this contract, and shall, as often as necessary, renew and replace links and pins, bell cord and couplings, and couplings for air-brake hose, without charge to the Pullman Company." Rec. pp. 4, 5.

7th. "The Pullman Company hereby agrees that it will keep the cars furnished under this contract in good order and repair, and will, from time to time, renew and improve the same when necessary at its own expense and will keep said cars up to the average standard of the best and most improved sleeping cars run on any railroad in the United States which uses an equal number of sleeping cars, except repairs and renewals provided for in Article Sixth of this agreement and such as are made necessary by accident or casualty, it being understood that the Railway Company shall repair all damages to said cars of every kind occasioned by accident or casualty during the continuance of this contract, except that the Pullman Company assumes all responsibility for any loss or damage occurring to said cars, arising from defective heating apparatus or lights furnished by it. And the Railway Company agrees, as proper compensation for the maintenance of the running gear and bodies of said cars that it will pay to the Pullman Company the sum of three cents per mile per car for every mile run by said cars upon the road of the Railway Company, or upon the roads of other companies by direction of the officers of the Railway Company while in service under this contract. Rec. p. 5.

"And the Railway Company hereby agrees at all times when requested by the Pullman Company, to make promptly such repairs to the cars furnished under this contract as may from time become necessary, and to make without request such repairs as may be required to ensure their safety, rendering bills monthly to the Pullman Company for repairs to cars, and charging for the same only the actual cost of material and labor expended on such repairs, with an addition of ten (10) per cent. to cover general expenses; all settlements and payments for mileage and repairs to be made monthly between said Companies.

"But it is understood and agreed that whenever the revenue from sales of seats and berths equals an average of seventy-five hundred dollars ($7500) per car per annum upon the number of cars furnished under this contract, then, while such revenue shall continue, the Railway Company shall not be required to pay mileage for any cars furnished under this contract, and the Pullman Company shall then bear the expense of all the repairs and improvements to said cars, except such repairs as are rendered necessary by accident or casualty and such as are provided for in Article Six of this agreement, which shall be made by the Railway Company, as hereinbefore mentioned. Rec. p. 5.

8th. The Railway Company agrees to furnish the Pullman Company, without charge, at convenient points, room and conveniences for airing and storing bedding.

9th. The Railway Company agrees that the Pullman Company shall be entitled to collect from each and every person occupying said cars such sum for said occupancy as may be usual on competing lines furnishing equal accommodations, and that such rules and regulations shall be mutually agreed upon as will most favor the renting of seats and berths in said cars.

10th. The Railway Company agrees to permit the Pullman Company to place its tickets for seats and berths on sale in such of the railroad ticket offices as may be desired by the Pullman Company, and such service shall be performed by and as a part of the general duties of the ticket agents and without charge to the Pullman Company. The proceeds of such sales to be at the risk of Pullman Company.

11th. The Railway Company hereby agrees that the Pullman Company shall have the exclusive right, for a term of fifteen years from the date hereof, to furnish for the use of the Railway Company drawing-room or parlor and sleeping cars on all the passenger trains of the Railway Company and over its entire line of railway and on all roads which it now controls or may hereafter control by ownership, lease or otherwise, and also on all passenger trains which it may, by virtue of contracts or running arrangements with other roads, have the right to use such cars, and that it will not contract with any other party to run said class of cars on and over said lines of road during said period of fifteen years.

12th. Guarantee by the Pullman Company of immunity to the Railroad Company, against all suits for infringement of patents, relating to sleeping cars furnished by the Pullman Company.

13th. Mutual agreement that "in case either of said parties shall fail to cleanse or repair, according to the conditions of this agreement any of said cars, then, and in that case, after written notice shall have been given to the defaulting party by the other party, of the default complained of, and the said defaulting party shall neglect or refuse so to cleanse or repair said cars within a reasonable time after such notice, the other party shall have the right to cleanse and make or cause to be made all necessary repairs and renewals to said cars, and said defaulting party shall pay to the other party the cost of such portion of the cleansing and repairs as said defaulting party is held to be liable for by the terms of this contract.

14th. Stipulation as to dissolution of the contract by default of either party, after reasonable time from notice in writing given to the defaulting party of such default.

Stipulation that the Railway Company may terminate the contract at the end of five years from or eight years from upon giving six months' notice. And in the event of the Railway Company electing to terminate the contract, then the Railway Company to purchase "the cars and equipment of the Pullman Company then in use or assigned or accepted for use upon its lines under this contract" at the actual cash value to be fixed by arbitration in default of agreement.

Taxes on the cars furnished to the Railway Company by the Pullman Company to be paid one-half by each party.

The foregoing is a full synopsis of the contract.

FACTS OF THE CASE.

The facts of the case as stated in the Bills of Exception are substantially as follows:

The contract was entered into on April 5th, 1879, between the parties, and the ten cars mentioned in the contract including the cars "Louisiana" and "Great Northern," were furnished and were put into operation on the plaintiff in error's line of railroad under the provisions of the contract; that both of said cars, the "Louisiana" and "Great Northern," were totally destroyed by fire on the morning of May 27th, 1882, at about 3 o'clock A. M., on the depot grounds of the Railway Company in the City of New Orleans, one of the termini of the Railway Company; "that at the time of said fire the car "Louisiana" was standing on the tracks of the plaintiff in error in the City of New Orleans, one of the termini of its railway, under a depot shed belonging to the plaintiff in error, and used by it to store cars when not in actual transit, both cars belonging to it as well as cars belonging to the Pullman Company, which shed was called by the employees of the defendant Company the "Pullman Shed;" that the said car "Louisiana" had come from a trip over the line of the Railway Company attached to one of the trains at 3.15 o'clock in the evening of the 26th of May, and was placed by the plaintiff in error in the said depot shed, where it was usual to place its own and the Pullman cars when not in transit, and that said car "Louisiana" was to go out on another trip attached to the plaintiff in error's train at 6 o'clock in the evening of the 27th of May, and was to be manned and equipped with the employees of the defendant in error mentioned in the contract sued on, and supplied by the plaintiff in error with the stores provided for in the contract sued on herein, on the day of the 27th, and prior to her departure; that at the time of said fire the car "Great Northern" was standing under the same depot shed (the whole of which was consumed by said fire), but in a different part thereof, to-wit., in a part thereof known as the "Pullman Repair Shop;" that the facts with reference to the "Pullman Repair Shop" were these: Subsequent to the contract of April 5th, 1879, complaint was made by the Pullman Company to the President of the Railway Company of the manner in which repairs were made to the Pullman cars at the shops of the plaintiff in error in McComb City, a point on the line of the plaintiff in error's road about 105 miles from the City of New Orleans, who thereupon suggested that the Pullman Company should repair the cars itself. Thereupon, in order to facilitate the defendant in error in the repair of the said cars furnished under the contract sued on, a part of the passenger car depot of the plaintiff in error in the City of New Orleans was set apart to the exclusive use and control of the defendant in error, who fitted up that portion assigned to it at its own expense, one part as a linen room, one as a carpenter shop, one as an upholstery room, and one as a paint shop, and enclosed the same with partitions, and kept the same locked and the keys in the possession of its employees. The employees of the plaintiff in error had no right of access into this repair shop. The tracks of the plaintiff in error extended into this repair shop, but across these tracks were folding doors, closed by an iron bar on the inside. For the use of this shop the defendant in error did not pay any rent or compensation to the plaintiff in error. The night watchman over the whole premises was set and maintained by the plaintiff in error. With the permission and consent of the plaintiff in error, the defendant in error had, on one or two occasions, repaired and varnished in said shop cars not covered by this contract, but assigned to other railroads.

The exact spot occupied by the "Great Northern" at the time of the fire, was that said car was standing on the tracks of the plaintiff in error, in the paint shop, enclosed behind the barred folding doors aforesaid; that said car had been in said shop since the month of October, 1881, undergoing repairs, refitting and revarnishing, and during the progress thereof her name had been changed to the "Chatawa;" that she would have been ready to go into transit service on the road on the following day when properly manned, equipped and supplied as provided in the contract sued on, if she had not been destroyed on said morning of May 27th, 1882; that there was no evidence that any other car had been placed on the plaintiff in error's road in actual transit service in place of the said car "Great Northern" while she was undergoing said repairs; that at various times during the existence of the contract sued on the defendant in error had taken some of the ten cars furnished thereunder to the shops in

St. Louis, Missouri, and Pullman, Illinois, entirely off the line of the road of the plaintiff in error, in order to be repaired so as to keep them up to the standard required by the contract; that the fire aforesaid, which destroyed said depot shed, including the repair shop and cars aforesaid, originated from a cause unknown about three o'clock in the morning of May 27th, 1882, within the said repair shop; that prior to, and at the time of said fire, there were ~~was~~ in effect two open policies of insurance, issued by the Royal Insurance Company of Liverpool, and the London and Lancashire Fire Insurance Company of London, in favor of the Pullman Southern Car Company, the defendant in error, each of which policies, in and by their terms (being identical), insured said Pullman Southern Car Company against loss or damage by fire to the amount of twelve thousand dollars on the property, described as follows: $10,000 on sleeping cars contained in the frame depot and sheds of the Chicago, St. Louis and New Orleans Railroad Company, on Calliope and Locust streets in New Orleans, La., with limit of $10,000 on any one car in case of loss; $2,000 on sleeping car supplies, tools and implements contained in the above described premises." Rec. pp. 15, 16, 17, 20.

That shortly after said fire and long prior to this suit the Pullman Company received from said insurance companies in full settlement and satisfaction of said loss and damage to the cars "Louisiana" and "Great Northern" insured against in said policies, the sum of $19,000 in cash. Rec. p. 20.

ASSIGNMENTS OF ERROR.

First Assignment of Error.

The Circuit Court erred in refusing to deliver to the jury, without the modification hereinafter mentioned, the following instruction requested by the plaintiff in error at the trial, to-wit:

"That if the jury believe from the evidence that the defendant by an arrangement with the plaintiff Company in the year 1879 set apart at their depot in the City of New Orleans a certain portion of said depot for the exclusive use and benefit of plaintiff as a repair shop, wherein the cars of the plaintiff mentioned in the contract sued on were to be repaired by the plaintiff at its own expense, and the said space was enclosed, fastened and locked, and the keys thereof were kept by the plaintiff or its agent, so that access thereto by the defendant or its agent was only such access as was necessary to enable the defendant Company to take possession of repaired cars when tendered for service by the plaintiff, and that at the time of the fire on the 27th of May, 1882, the car 'Great Northern' was in the said repair shop, and had been there for a period exceeding six months, for the purpose of being repaired, and that at the time of the fire said car had not been tendered for service as a car completely repaired and equipped for service to the defendant, although ready to be tendered, then that the jury must find that the defendant is not liable for the loss of the said car 'Great Northern' or for any damage thereto by fire aforesaid." *This instruction the Court refused to deliver, except with the following modification or addition (duly excepted to by plaintiff in error):*

"Unless the jury further find that the said car had been withdrawn from the dominion of the contract, and it was held, according to the understanding of both parties, for some other purpose; that is, for some other purpose than those of the contract." *And the Court erred in making said addition or qualification and it also erred in its general instruction to the jury, in giving to the jury the following explanatory interpretation of the contract sued on, to-wit:*

"It was undoubtedly competent for the parties to this action to have withdrawn their cars from the dominion of the contract, but to constitute such a withdrawal there must be the intent of the plaintiff to retain them for some other purpose than to continue their use under the contract, and if the jury find that there was a placing of the cars in the separate room or apartment with the intent, on the part of the plaintiff, to use them independently of the contract, and not under it, then the defendant would not be liable for their destruction.

"If on the other hand the jury find that though there was a placing of the cars in the separate room or apartment, but with the intent to continue to use them under the contract, and to hold them so placed merely for the purpose of repair under the contract, and the defendant shared this intent, then the defend-would be responsible for their destruction by fire.

"In determining this question the jury will consider all of the facts and circumstances established, including the fact that the cars remained on the tracks of the defendant, and will further consider whether the defendant is shown to have any relations to these cars except under the contract." Rec. pp. 15, 16, 17, 18, Bill of Exceptions No. 1.

And the Court erred in refusing to give the following instruction to the jury requested by the plaintiff in error:

"That if the jury believe that the cars, 'Louisiana' and 'Great Northern,' were destroyed at the depot of the defendant company while the said cars were not in actual use and service by the defendant company, then they must find a verdict for the defendant."

And the Court said: "I refuse that instruction, provided you you find that they were being repaired under the contract. That's the test which the court gives you all the way through—whether these cars, according to the meaning of the parties, were or were not under the contract, the contract providing for repairing as well as running." Rec. p. 18.

And the Court also erred in instructing the jury at the request of the defendant in error as follows:

"That the said contract covers the said cars while standing on the tracks of the defendant in the yards and under the sheds used for stowing cars while not in transit;" *and in saying to the jury:* "Gentlemen, I add to that, so as to make it clear and the meaning more specific, 'but while held for transit or repair on defendant tracks under the contract,' so that the instruction will read: 'That said contract covers the said cars while standing on the tracks of the defendant in its yards and under the sheds used for stowing cars while not in transit, but while held for transit or repair on the defendant's tracks under the contract." Rec. pp. 18, 19.

The Circuit Court also erred in giving to the jury the following instruction at the request of counsel for defendant in error:

"That a damage or destruction by fire is a casualty or accident within the terms of said contract." Rec. p. 19.

Second Assignment of Error.

The Circuit Court erred in delivering the following instruction to the jury at the request of the counsel for the defendant in error:

"That the insurance of the said cars by the plaintiff is *res inter alios acta*, which has no determining effect upon the rights of the plaintiff to recover here." Rec. p. 20.

Third Assignment of Error.

The Circuit Court erred in refusing to deliver to the jury the following instruction, requested by counsel for the plaintiff in error on the trial:

"That the contract sued on is void as against public policy, because of the monopoly provision contained in the eleventh stipulation of said contract, and the jury is instructed to find a verdict for the defendant." Rec. p. 21.

ARGUMENT.

I.

The view of the law taken by the Circuit Court in expounding the contract to the jury and embodied in the above instructions, is apparently that the contract sued on is virtually an ordinary contract of lease, or one of the well known forms of bailment, whereby the Pullman Company (lessor) *delivers* to the Railway Company (lessee) to be used by it for a definite term a certain number of sleeping cars in return for a fixed consideration or rent. A careful reading of the contract will show that this is not an ordinary contract of lease, or other well known form of bailment, but that it is a very extraordinary one, if, indeed, it can be termed such a contract at all. In the first place, the things furnished or to be furnished (the subjects of the contract) are not a definite number, but a variable number; not ten cars, but a number "sufficient to meet the requirements of travel on and over the lines of railway, and on and over all lines of railway which it (the lessee) now controls or may hereafter control, etc.; the cars so furnished to be *in part* the cars now operated on the lines of the Railway Company, namely, Autocrat, Bolivar, Great Northern, Grenada, Jackson, LaBranche, Louisiana, Natchez, Norman, Templar."

The naming of these cars is clearly not a bailment of each particular car named in the contract and a formal assignment or destination of each of said particularly named cars to service on the railways of the plaintiff in error, to be held continuously in such service, until the end of the contract, or until formally withdrawn by the consent of both parties; but it is clear that such ten cars are named simply to indicate in some degree the *sample, style, pattern, or degree of perfection* of the cars to be furnished "during the continuance of the contract;" for the contract distinctly says, "said cars to be satisfactory to the General Manager or Superintendent of the Railway Company, the cars so furnished to be *in part* the cars now operated on the lines of the Railway Company," etc. This does not mean that the parties to the contract should begin to put into operation ten cars at the start, but the words "in part" may mean either a part of ten cars, or a part of twenty cars, or a part of any other number, according to "the requirements of travel."

The contract begins by saying, "that the Pullman Company will furnish drawing room cars and sleeping cars to be used by the Railway Company for the transportation of passengers, sufficient to meet the requirements of travel," and there is not a line in the contract purporting to mean that the Pullman Company *does hereby furnish and set apart for the use of the Railway Company*, and the Railway Company does hereby *accept for service* on its line during the continuance of this contract any certain number of cars.

The reason for this indefinite number of cars is plain. The Railway Company could not afford to pay mileage, not to speak of other expenses and onerous responsibilities, for hauling superfluous or empty cars, which would be the case if it engaged to haul more than were needed "to meet the requirements of travel;" nor would it be to the interest of the Pullman Company to pay the wages of employees to man such superfluous or empty cars, and, besides this consideration, there is another on the part of the Pullman Company, namely, so long as the Pullman Company furnished cars "sufficient to meet the requirements of travel on the lines of railway," it fulfilled its contract to the letter, and so long as it did thus much, it might take the balance of such ten cars, or any other number, and employees to man them, and furnish them, or put them into service on another, independent, and even a *rival*, line of railway, and the plaintiff in error could not complain or suffer the slightest damage.

It is therefore impossible to infer from the words of the contract, that the intention of the parties was thereby to place ten designated cars, or any other number "under the dominion of the contract" in the beginning, and keep them there continuously, as erroneously assumed by the Circuit Court in the above instructions.

In the second place, the charge or price to be paid by the Railway Company for the alleged "hire" of said cars is not a fixed sum, as rents generally, but a variable sum, not to be determined by a *period of time* or term, but fixed only as to *rate*, and dependent entirely upon the distance travelled by each of such cars, regardless of time.

The contract provides that the Railway Company "will pay to the Pullman Company the sum of three cents per car per mile for every mile run by said cars upon the road of the Railway Company, or upon the roads of other companies, by direction of the officers of the Railway Company *while in service under this contract.*" Not a cent of "rent" or "hire" was due, or was to be paid for any car without service furnished in such car.

In the third place, none of the cars are by the contract *delivered* formally into the possession of the Railway Company, except at the moment of actual service, when the cars were manned with employees, and the contract nowhere provides that the railway does hereby acknowledge the receipt, possession or control of so many cars, nor did it have such absolute possession or control, but the contract, after reciting that "the Pullman Company hereby agrees at its own proper cost and expense to furnish one or more employees as may be needful upon *each of said cars*, whose duty it shall be to collect fare for the accommodations furnished in said cars, and wait upon passengers therein, and provide for their comfort," recites that, "*in consideration of the use* of the aforesaid cars (as many as were needed to meet the requirements of travel), the Railway Company hereby agrees to *haul* the same on the passenger trains on its own line of road, and on all roads which it now controls or may hereafter control by ownership, lease or otherwise, in such manner as will best accommodate passengers desiring the *use* of said cars."

The words "possession," "delivery," "control," or other equivalent term or set of words suggestive of bailment, are not to be found in this contract, but the peculiar word "furnish" is employed. The whole contract, its scope and purview, its objects, ends and consideration, related to actual use, to service, "to the requirements of travel," and to nothing else.

The subjects of this contract, the things to be furnished, are what are termed *fungible things* in the modern civil law (choses fongibles)—that is, things variable in number, quantity, etc., to be furnished according to use, or experience or need. *See Goudsmit's Pandects, pp. 95, 96, 97.*

This leads to the question of consideration. What is the consideration of the contract sued on? It is too clear for discussion that the real and the declared consideration of the contract is the *use* of Pullman cars of a sufficient number, *manned and equipped with Pullman employees,* to meet the requirements of travel on the lines of the Railway Company. The contract so states explicitly. The Railway Company, in consideration of such use, not the bare right to use or the honor of using Pullman cars, binds itself to *haul* as many of such cars as the requirements of travel may demand, and solemnly covenants to haul no others of similar kind, and the Pullman Company binds itself to furnish the use of no more, no less. The more cars hauled, presumably, the more benefit the Railway got out of the contract, and *certainly* the more net revenue and mileage the Pullman Company earned. It was, therefore, to the interest of each party to keep only as many cars in service, under this contract, as the requirements of travel demanded.

In the fourth place, the railway did not in any event enjoy the fruits or revenues yielded by the things furnished (the Pullman cars), but every dollar of the earnings went into the coffers of the Pullman Company. The Railway Company could enjoy only the *use*, by its passengers, of the cars that were *actually in the service.*

This plain analysis of the innominate contract shows that, in its essential features, this is an *executory*, not an executed bailment. The contract was not a continuous and uninterrupted lease or other bailment of so many cars, the use of which the Pullman Company *deprives itself*, and turns over to be enjoyed by the Railway Company, but the "dominion" of "the contract" was *intermittent;* some cars were in service, some not in service, dependent entirely as to the *number* of cars at any particular time, upon the requirements of travel at such time.

The Railway Company binds itself to *haul* for a period of fifteen years the equipped cars of the Pullman Company, simply for *the service in them*, to be enjoyed and paid for by the railway passengers, and while the railway passengers enjoyed or might enjoy such luxuries, the Railway Company undertook to pay hire, or rent, and to haul the cars on its passenger trains, and to be responsible for accident or casualty while thus in service, and the Pullman Company took every cent of the earnings.

To the defendant in error, the vital question in this case is, what is the true meaning of the words in Section seventh of the contract, the indemnity clause, reading as follows: "The Railway Company shall repair all damages to *said cars* of every kind, occasioned by accident or casualty during the continuance of this contract;" for this is the basis of defendant in error's suit. To what does the words "said cars" refer? Do the words "*said cars*" refer to any definite number of cars, or do they refer to such number as may be in service at the particular time of an accident or casualty for which the Railway is liable to repair? Is the scope of these words "*said cars*" dependent upon how many cars were originally furnished at the beginning of operations under this contract? Or are they to be limited to the number of cars that were actually in service at the time of the particular accident or casualty? Is the indemnity feature of this contract absolute as to ten particular cars or any other number, or relative to as many as were actually in service at any given time? Suppose the parties began operations with ten cars, and then it was found that eight were sufficient to meet the requirements of travel, and the other two were simply laid up, and the operations carried on with the *eight*, would the Railway, under the terms "said cars," be responsible for accident or casualty to the two while thus laid up? When the Railway Company could not enjoy the use of such cars, and the Pullman Company *could*, by putting them into service on another, perhaps a rival line of railway? What is the test of this limit of indemnity? For there ought to be some *certain* test. Is it to be found in the number of cars furnished in the beginning, or is it to be determined by the number actually employed in service at any given time, or does it depend upon what the intention of the parties might be at such given time as to indefinite future operations, supposing that to be practical? If we hold the test to be the number furnished in the beginning, irrespective of whether all of the said cars were in service or not at any given time, then we might make the Railway Company responsible for the consequences of an accident or casualty which the Railway Company could neither cause nor prevent, and for which indemnity the Railway (*quoad* the particular cars not in service) *got no premium*, and while the Pullman Company might be in default for not having them ready for service.

If we make the present intention of the parties as to uncertain future operations, irrespective of the fact of how many cars were actually in service at any given time the test, then we might include the whole equipment of the Pullman Company, ten cars, twenty cars or an hundred cars, and get exactly the same results; no power in the Railway Company to cause damage to cars not in service—no power to prevent it and no premium received by it for this omnibus and unlimited indemnity. So we may be certain that the words "said cars" are to be taken, according to the contract, *relatively* to the number actually in service at any given time. Any other interpretation or construction would defeat the consideration or cause of the contract, which is solemnly declared by the parties to be "the use of sufficient cars to meet the requirements of travel."

Can the word "*use*" be made to mean anything but actual *use?* What is meant, then, by the terms "in service?" When was a car in service? Does the contract furnish us with any explanation of these terms or give us any test how they may be arrived at? Article seventh gives a clue to the meaning of these terms. It provides "that the Railway Company shall pay to the Pullman Company the sum of three cents per car per mile for every mile run by said cars *while in service under this contract;*" and in section sixth, "in consideration of the *use* of the aforesaid cars, the Railway Company hereby agrees to haul the same," etc.; and in the preamble we read further, "that the Pullman Company is now engaged in the business of *operating railway cars* known as drawing-room cars and sleeping cars under certain patents belonging to it, and of hiring the same (that is, cars so operated by it) to railway companies under written contracts for a term of years, to be used and employed on and over the roads, etc., and receiving therefor income and revenue *by the sale to passengers of seats, berths and accommodations therein.*" And, in section second it is further provided, "the Pullman Company hereby agrees at its own proper cost and expense *to furnish one or more employees as may be needful upon each of said cars,* whose duty it shall be to collect fares for the accommodations furnished in said cars, and generally to wait upon passengers therein and provide for their comfort;" and section ninth provides, "that the Railway Company further agrees that the Pullman Company shall be entitled to collect from each and every person occupying said cars such sum for said occupancy as may be usual on competing lines furnishing equal accommodations, etc;" and in section tenth, "the Railway Company agrees to permit the Pullman Company to place its tickets for seats and berths on sale in the railway offices, such service to be performed by and as a part of the general duties of the ticket agents without charge to the Pullman Company, the proceeds of such sales to be at the risk of the Pullman Company."

These provisions show, without any doubt, that any particular car or number of cars were *by the terms of the contract* in service *when being operated by the Pullman Company in furnishing accommodations to the railway passengers.* The Railway did not agree to *hire* certain cars, but hired the service in such cars *furnished by the Pullman Company,* the Pullman Company binding itself to furnish both the cars and the whole service in them. All the Railway Company had to do in contributing its part to this service under the contract was to haul the cars thus *equipped and operated by the Pullman Company,* to carry such cars. It is, therefore, certain that any particular car was in service, "was under the dominion of the contract"—when manned by the Pullman employees and attached to the railway passenger trains; when being *hauled,* when it was earning mileage, or in other words when the Railway was getting the *use* of it under the contract. The facts of the case in hand are indisputable; neither the "Louisiana" or "Great Northern" were in service, were being hauled or were ready to be hauled, at the time of their destruction by fire on May 27, 1882, at 3 o'clock in the morning. The "Louisiana" had not been in service for twelve hours or more, and the "Great Northern" had not been in service *for more than six months.*

The contract was an intensely onerous one to the Railway Company, at the very best, even when the railway was being furnished with the greatest number of cars, and its passengers with best possible service, for the following reasons:

1st. The railway furnished roadway, motive power, and passengers to occupy said cars, besides supplying ice, fuel, material for lights and lubricating material, links, bell cord, pins and couplings for air brake hose, everything necessary for the hauling of said cars.

2d. The Pullman Company furnished nothing but the cars, bed clothes and servants to man them.

3d. The railway did not derive a cent of revenue from the operation of such cars, and paid all the *estimated* cost of repairing, the ordinary wear and tear, viz., three cents per car per mile.

4th. The railway bound itself not to haul or use any other pattern or style of such like cars belonging to any other person or corporation for the period of fifteen years, no matter how favorable the terms it might otherwise be possible for the Railway Company to make for itself or for its passengers.

5th. The Pullman Company might use the very same class of cars on rival lines of railway, make more favorable terms with such rival railway lines than it did with the plaintiff in error, and thus enable such rival, by being able *to cut passenger rates*, without loss, to get all the competitive business, in being able to furnish equal accommodations.

6th. The railway assumed the whole responsibility for accident or casualty to said cars while actually in service under the contract, except from defective lights or heating apparatus.

7th. The Pullman Company got room for airing and storing bedding used in said cars free of rent, and its tickets sold in railway offices free of charge.

There can surely be no possible presumption raised here, that the *consideration* in this case was rather the *disadvantage* suffered by the Pullman Company in allowing its cars to be used on the railway lines of plaintiff in error, than the small advantage or *benefit* of the Railway Company, growing out of the actual *use* of such cars. Human ingenuity could not devise a more beneficial contract for the *Pullman* Company, or a more onerous one to the *Railway* Company than the one in hand.

Hence, the *necessity* of the Railway Company insisting upon one practical feature *at least as its consideration or condition*, the *use* of such cars. Not the bare right to use, but the actual *use*, was what it stipulated for in this manifestly unfair agreement.

It is impossible by any principle of fair interpretation to make the word *use* mean anything but the actual use, the hauling of Pullman Cars, manned and equipped by Pullman employees and attached to the railway passenger trains.

Surely the Railway Company could not be held responsible for cars, which were not needed for service, or were not ready for service, when, forsooth, the Pullman Company might be in default for not having them ready for service or properly repaired, when the cars might not be satisfactory to the General Manager or Superintendent of the Railway Company.

The instructions of the Court left the jury no alternative whatever; all the *facts* necessary to determine the "dominion of the contract," were *assumed* to be favorable to the Pullman Company except the fact as to *insurance of cars* against fire while thus stowed away out of service, which was expressly taken away from the consideration of the jury. The Pullman Company, by these instructions, was deemed to have done its whole duty under the contract by merely furnishing the cars in the *beginning;* and if the cars were "satisfactory to the General Manager or Superintendent of the Railway Company," *then* the presumption was that they were so ever afterwards, whether properly repaired or manned or not, and it made no matter that the Railway Company had no opportunity to inspect them before using them and thus obtain satisfaction.

The burden of proof was thus placed by the instructions on the Railway Company to show that the *uninspected* cars were *not* satisfactory, and to show that the Pullman Company's officers had *in mind* the purpose of doing something else with the cars than repairing them or running them; and, as there was no hint of such intention in the evidence possible to be produced by the Railway Company, and as the Pullman Company did not avow any such, and as the contract provided only for "repairing or running"—the jury could only find one verdict.

The instructions of the Circuit Court are not rendered any clearer by specially instructing the jury in arriving at the "dominion of the contract," to consider the fact that the "cars remained on the tracks of the *plaintiff in error*" (the *locus* of the repair shop of the Pullman Company, which it kept locked and barred and of which it had absolute control, and which was established for its *exclusive* benefit and where the fire *originated*).

Outside of this it was clearly *accidental* that the "Great Northern" was in this repair shop at the time of the fire; so far as *service* under the contract for six months past was concerned, she might just as well have been in Pullman, Illinois, or San Francisco, laid up for repairs or being operated *on a rival line*, as she was *inaccessible to the Railway Company*, either for service or *salvage*, when locked and barred within this repair shop.

It is impossible to see how an arrangement made by the Pullman Company to suit its *own convenience* and to save it money (*e. g.* mileage or freight on cars hauled to Pullman or St. Louis for repairs, and 10 per cent. over cost of labor and material for having the cars repaired by the Railway Company, which it thereby saved, and the occasional opportunity to repair cars for other railroad companies running into New Orleans, as the record shows—Rec. p. 16) could fairly be made to *militate* against the Railway Company who got no conceivable benefit from the establishment of such shop in New Orleans.

If there be within the domain of human imagination any case where the maxim *res perit domino suo* peculiarly applies, it is to a case where the *thing* is absolutely in the possession and control of its *real owner*, when the other contracting party gets no benefit or premium from the thing and has no power either to cause or prevent damage to it. The most unqualified undertaking of the other party, under such circumstances, to be answerable for "accident or casualty" to the thing would be without any conceivable cause or consideration.

The Pullman Company clearly cannot claim any benefit from doubtful and ambiguous words or phrases inserted in this contract; and it is beyond discussion that the scope of the indemnity clause in section 7 is *at least* doubtful. The doubt must be solved *against the* Pullman Company, because the Pullman Company here occupies the position of the lessor, and all doubts are determined as against him.

Murrell vs. Lion, 30 An. 256.

*Powell on Contracts (Eng. Ed. 1790) *395.*

The lessor draws these indefinite and widespread terms to *protect himself*, and in this case drew them for the purpose, not only of protection against possible *loss*, but for the purpose of being able to *hedge* and say: "I agreed to furnish not ten definite cars, but only enough 'to meet the requirements of travel,' and as you need only *eight, or six*, I will place the other two or four in another service, your competing line." Thus in the very beginning of the contract giving the railway to understand that defendant in error would only be bound to put itself to the *inconvenience*, or disadvantage of furnishing cars "sufficient to meet the requirements of travel" at any given time, and in Section seven deftly inserting the words "*said cars* during the continuance of the contract," with the *idea* that it could adopt either interpretation, as future events might suggest it to be to its interest to adopt, the definite ten cars, or the indefinite "sufficient to meet the requirements of travel."

A set of words or sentence in law can have but *one true meaning*. The contract must be taken in that *sense which the Railway understood it*. As well observed in a recent Scotch Insurance case by a great Judge, "that is the true meaning of my contract, which I desire the other contracting party to put upon it, *not that which in my own favor I wrap up in general phrase.*"

Life Association of Scotland vs. Foster, 11 C. S. C. (3d Series) 351, 371.

Lieber's Hermeneutics (Hammond's Ed.) pp. 301, 302.

*Powell on Contracts (Eng. Ed. 1790), *395 [397].*

If anything further were needed to show that this contract means, as we have above attempted to show it does mean, it is found in the fact of the Pullman Company's own prior, contemporaneous and subsequent construction of the contract, and action thereunder "during the continuance of the contract" and for five years after its alleged loss occurred.

It kept the cars covered by "blanket policies" in two insurance companies, insuring any two cars against loss *by fire* when stowed away "in the frame depots and sheds of the Chicago, St. Louis and New Orleans Railroad Company, on Calliope and Locust streets, in New Orleans, La., with limit of $10,000 on any one car in case of loss. And it collected upon said policies $19,000 in full settlement of this loss from such insurance companies "long prior to this suit," and never made formal claim upon the Railway Company for indemnity, until nearly five years after the fire.

Why did it go to the expense of paying the premiums for this extra insurance, if any two cars while thus stowed away, *out of service*, were fully covered by the terms of the contract with the Railway Company? And, if it considered that the Railway Company was legally liable for these cars, while thus stowed away out of service, why did it not make claim upon the Railway Company *at once* by "written notice," and enforce its demand by suit, after giving the "defaulting party" a "reasonable time after such notice, to make or cause to be made, all necessary repairs and renewals to said cars," as provided by section *thirteenth?*

Is *five* years a reasonable time to wait for a defaulting party to fulfil his covenant? Or, why, if it conceived the railway to be liable, did it not claim from the railway a "*settlement*" of accounts for "mileage and repairs" under section *seventh*, within the month after the fire, as the contract provided *both* parties were to do? And why was not this suit brought for a settlement of accounts, for the *balance* claimed in its favor by the Pullman Company, under that section?

There is no conceivable answer to these questions to be found in the record, unless it be that the Pullman Company so acted because it did not consider that cars stowed away out of service were covered by this contract, and so considering specially insured them against loss by fire.

The bringing of this suit, and setting up of this extraordinary claim *five years after the fire*, under all circumstances of this case, shows beyond a doubt that the construction *now* for the first time set up by the Pullman Company, is in its *fairest* aspect, an *afterthought.*

No rule is better settled than that rule of law which adopts the contemporaneous acts and construction by the parties themselves of doubtful and obscure terms in a contract, as the law of the contract.

This is always the rule in the case of contracts exhibiting intricate relations, difficult of exact definition, dealing in generalities, and in contracts *uberrimæ fidei*.

It cannot be pretended that this long delay in asserting "clear legal rights" was an act of liberality by a generous opponent. The trick of taking the "shoes from off the feet," upon *pretense* of "standing upon holy ground" is an old one. Burglars and thieves have been known to resort to it when in the act of plundering the sanctuary.

Neither of these cars were in a condition for service at the time of their loss by fire; they were not manned and equipped with employees, were not ready for service, were not "furnished;" indeed, one of them was absolutely outside the physical power of the Railway Company either to *cause* or *prevent* damage, being locked and barred within the *Pullman Company's own shop*, where it had been for six months, and the Railway had been deprived of the use of it for that time, without there being any other car in its place in service during that time. So that either the Pullman Company had been continuously *in default* for six months, or else that the car was outside the "dominion of the contract" as matter of law, because not necessary "to meet the requirements of travel."

What is the practical difference to the Railway Company, under this contract, in the case of a Pullman car that never had been "in service" at all, under this contract (whether locked up in Pullman, St. Louis or New Orleans, or running on a rival line of railway) and a car that had once been in service, under this contract, but laid up for any cause at a given time? Could the Railway be enjoying the *use* of such car in any event, and is the Pullman Company placed at any greater disadvantage in respect to such car than it would be if it had never put it into service under this contract on the railway of the plaintiff in error at all?

It is elementary, even in the "mint and anise and cummin" theory of consideration in the common law, that a consideration must be either a benefit to the one party or a disadvantage to the other, arising out of the relation created by the contract.

Wald's Pollock on Contracts, p. 167.
Powell on Contracts [330].

It could not possibly concern the Railway Company as to what the Pullman Company did with its cars so long as the Railway were "furnished" with "sufficient to meet the requirements of travel." All the Railway could possibly insist upon was that the Pullman Company should, within a reasonable time, "furnish" such cars as might be needed, and the Pullman Company, though it delayed so doing, would not be legally *in default* until a written notice had been given it, and a "reasonable time after such notice" had elapsed. (Sec. 14, Rec. p. 7.)

Even if the Pullman Company then contumaciously continued in default after written notice and a "reasonable time," there was *no penalty* provided, except the dissolution of the contract by the Railway Company; it could never recover a cent of damages because it would be impossible to prove the measure of damages. Indeed, assuming the views of the Circuit Court to be correct, it appears to us clear that the most favorable circumstance possible in which to view this contract from the Railway standpoint would be where the Pullman Company had actually been put in default for not furnishing cars "sufficient to meet the requirements of travel" according to section 14, and the Railway claimed the "contract ended and no longer in force" in virtue thereof.

Thus the demonstration amounts to *reductio ad absurdum.*

II.

The error of the Circuit Court in respect to the instruction as to the insurance is two-fold:

First. It was an invasion by the Court of the peculiar province of the jury in a matter entirely within their discretion, viz: the *value* of each of said cars, or the amount of damage to each by the alleged "casualty or accident" which caused their destruction.

The insurance on said cars was some evidence of value in any view, and the fact that, in adjusting the loss with the insurance companies, the Pullman Company accepted *in payment* and full settlement an amount *less than the face of the policies*, at a time not suspicious, when the facts were fresher and more accessible, "long prior to this suit," was conclusive evidence that each of said cars was worth *less*, or the amount of damage thereto was less, than they were insured for.

Now, suppose the jury did not intend to find that the car "Great Northern" was under the dominion of the contract, but only intended to find for defendant in error in respect to the car "Louisiana," and suppose the evidence produced by the Pullman Company, tending to show the value of each car, was the sworn statement of its car builders and superintendent, showing what each car had cost when *built*, and how much had been since added in repairs, painting, varnishing, modernizing, etc., and that the evidence of value of the "*Louisiana*" thus tended to show her to be worth $19,000, *then leaving out of view this insurance*, we have this result, the Court instructing the jury to *disregard* what might be the best evidence before them.

The Court gave the charge in absolute terms, as requested by defendant in error, without any explanation whatever, or any qualification.

Second. The contract sued on, whatever else it may be called, is a contract of *indemnity*, just as are the fire insurance policies in this case.

The Pullman Company, suing in its own right, could recover no more than its *actual loss* outstanding at the time of trial, namely, the value of said cars, less the amount it had been already paid by the insurance companies *as indemnity*. And if asserting the right of the insurance companies in its name, the Pullman Company could recover only their *pro rata* share of the loss.

The Railway Company would only be bound to *contribute* to the loss already sustained by the insurance companies.

Thurston vs. Koch, 4 Dall. 348.

Insurance Co. vs. Transportation Company, 117 U. S. 312, 320.

Castellain vs. Preston, 11 Q. B. Div., 380 at 386, per Brett, L. J.

52 L. J. Q. B. 366.

49 L. T. N. S. 29.

31 W. R. 557.

Porter on Insurance, marg. p. 2.

Wood on Fire Insurance, p. 828.

Potter vs. Marine Ins. Co., 2 Mass. 475.

Aetna Ins. Co. vs. Tyler, 16 Wend. (N. Y.) 385.

Lucas vs. Jefferson Ins. Co., 6. Cow. (N. Y.) 635.

Newby vs. Reed, 1 W. Bl. 416.

The only conceivable difference between the policies of insurance and the contract sued on, is that in the one case the risk extends only to loss by *fire*, and the premium is paid in money, and in the other the risk extends to accidents or casualties of every kind (assuming for argument's sake that it includes loss by fire) and the premium is paid, not in money, but in prospective-service. The *nature* of the fire insurance contracts and the mileage contract sued on are identical; both are contracts of *indemnity.*

The equities, therefore, as between the two insurance companies on the one hand, and the Railway Company on the other, are exactly equal.

So far as the Pullman Company was *paid*, its cause of action in its own right was extinguished.

In Louisiana law, this suit in its present form in the right of the insurance companies could not be maintained at all, because there is neither *legal* nor *conventional* subrogation.

Civil Code of Louisiana, Arts. 2160, 2161.
Code Napoleon, Arts. 1249, 1250, 1251.
Laurent, Droit Civil Francais, Vol. 18, Secs. 24 et seq.
Carroll vs. Railroad Company, 26 An. 447.

Conventional subrogation must be express and made at the same time as the *payment*, and legal subrogation must flow from the express provisions of the law which clearly do not cover a case of this kind.

The instruction of the Court meant either that the Pullman Company could recover over again the full amount of its loss, in its own right, regardless of what it had been paid, or, that it could recover in the right of the insurance companies more than they had paid, if asserting their rights.

Thus in effect telling the jury that either the Pullman Company or the insurance companies, or both, might speculate and make a profit upon their respective losses at the expense of the Railway Company; a result abhorrent to every principle of insurance law.

III.

The contract sued on is a most absolute and unqualified monopoly, giving the Pullman Company the exclusive right to furnish any Sleeping Cars or Drawing Room cars to the Railway Company for the period of fifteen years and binding the Railway Company not to contract with any other person or company in reference to the running of any such sleeping cars on its system of railway, *present or future*, during such term.

It needs no extended argument to reach the conclusion that this stipulation is in effect a total restraint of trade.

The Railway Company made this contract for the *benefit of the public*, it got no benefit of revenue from the contract for itself, and the Pullman Company in Section ninth reserved the right to charge the public for accommodations furnished in these cars, just what *competing lines* charged, when, if there were no competing lines, or, where the Pullman Company operated cars on such competing lines (*e. g.*, if the Louisville and Nashville R. R. Co. was at that time 1879–1882, the only competing line), it would be charging according to its own measure.

Pickard vs. Pullman Southern Car Company, 117 U. S. 34.

But more than this, *non constat*, that, but for the entering into this contract, the Railway Company would have been able to secure, not only better service from other sleeping car companies, as the Waggner, the Mann, or the Monarch, or others, but cheaper fares for the *travelling public*, who were entitled to the best service at the lowest obtainable price.

The following authorities are clearly instructive on this question :

Wiggins Ferry Co. vs. Ohio, etc. R. R. Co., 72 Ill. 360.

Texas and Pacific Railway Company vs. Southern Pacific Co., 41 La. An. 970.

Smith's Leading Cases (Notes to Mitchell vs. Reynolds).

1 Pierre Williams, 181.

Tel. Co. vs. Tel. Co., 23 Fed. Rep. 12.

Tel. Co. vs. Tel. Co., 34 Fed. Rep. 319.

West Virginia Trans. Co. vs. Ohio River Pipe Line Co., 22 W. Va. 600.

Skrainka vs. Scharringhausen, 8 Mo. App. 522.

Hoagland vs. Sigur, 38 N. J. L. 230.

Maier vs. Homan, 4 Daly (N. Y.) 168.

Dethless vs. Tamsen, 7 Daly (N. Y.) 354.

More vs. Bonnet, 40 Cal. 251.

Callahan vs. Donnely, 45 Cal. 152.

Wiggins Ferry Co. vs. Ohio, etc. R. R. Co., 3 Mo. App. 341.

Roy vs. Mackin, 100 Ill. 246.

Bingham vs. Maigne, 52 N. Y. (Super. Ct.) 90.

Tel. Co. vs. Tel. Co., 7 Biss. 367.

It is to be observed that contracts tending to the restraint of trade, containing professedly and clearly unfair and unjust terms, harsh penalties and unequal burdens upon *one* party only, are peculiarly odious to the courts in enforcing this doctrine. What must be said of such a contract made for the *benefit of the public*, who are alone interested in it, by a Railway Company, who endeavors to do its whole duty and fulfil its honorable mission, but from whom the *other* party is able to extort, whether by *patent*, valid or pretended, or otherwise, and does extort, not only a monopoly, but outrageous terms, both to [illegible] the railway and its passengers, by taking advantage of the situation?

The case of the defendant in error as presented in the instructions of the Circuit Court is thus shown to be indefensible upon any theory of law, equity or public policy, and the award of justice of this high tribunal is confidently awaited.

It is respectfully submitted that the decree of the Circuit Court is erroneous and must be reversed.

Respectfully submitted,

GIRAULT FARRAR,
THOS. J. SEMMES,
JAMES FENTRESS,
Of Counsel for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No.

CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY, Plaintiff in Error,

versus

PULLMAN SOUTHERN CAR COMPANY, Defendant in Error.

SUPPLEMENTAL POINTS AND AUTHORITIES ON BEHALF OF PLAINTIFF IN ERROR.

THOS. J. SEMMES,
Of Counsel for Plaintiff in Error.

T. H. Thomason, Print, 33 Natchez St., N. O.

Supreme Court

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I.

The Court below erred in leaving the construction and interpretation of the contract to the jury. The contract being in writing, it was the exclusive province of the Court to construe it.

In Bowes vs. Shand, Law Rep. 2 Ap. Cases, p. 462, the contract was in these words: "We have this day sold for your account to Bowes and others the following Madras rice, to be shipped at Madras or Coast for this port during the months of March and-or April, 1874, about 300 tons, per 'Raja of Cochin,' at 11 s. ½d. per cwt. for 'Fair Pinkey.'" In regard to this contract Ld. Chan. Cairns, said: "So far as the construction of the conse words is concerned, unless there be o the words by reason of the custom ch the contract relates, the construction for the Court. That has been said so often fer your Lordships to any authority upon the su Court itself, which, when once it is in possession of the circumstances concerning the contract, and of any peculiarity of meaning, which may be attached by reason of the custom of trade to any of the words of that contract, has to place the construction upon the contract."

In Hutchinson vs. Bowker, 5 M. and W., p. 540, Ld. Abbinger said :

"It apppears to me that the question as to the interpretation of this contract is a question entirely for the Court and not for the jury. That they should ever be the judges on such a matter was founded on this, that there might be technical words used in the contract which the jury might understand and the Court might not; but it would be contrary to all practice to say, after the terms are explained to the satisfaction of the Court, that the jury are to have the interpretation of the contract and not the Court."

In Hitchin vs. Groom, 5 Mann. G. and Sc., p. 520, it is said : "The construction of the contract being for the Judge, it was quite unnecessary to leave to the jury any question of intention. The question, therefore, was incorrectly left. He ought to have put the construction upon the agreement as it stood."

The same principle was applied in Griffiths vs. Rigby, 1 H. and N. 240, wherein the Judge at the trial told the jury that he would not give them any explanation as to what was meant by "fairly wrought," and that they were better judges of the meaning of the phrase than he was; he told them, however, what he thought it meant. The Court held that the direction thus given was in-sufficient. Pollock, Chf. Baron, said: "'Fairly wrought' means that which can be fairly and properly gotten, according to mining usage, without extraordinary difficulty or expense." And Martin, Baron, said: "I think the Judge was bound to state the meaning of the words in question." So in Elliott vs. So. Devon. R. R. Co., 2 Exchq., p. 724, Rolfe, Baron, said: "The verdict in this case is wrong, because the jury have not been properly directed as to the point to which they ought to apply their attention. The learned Judge was bound to define the meaning of word 'town' sufficient for the purpose of enabling the jury to decide the issue. No doubt it is difficult to lay down a definition which would meet every case," and all the Judges of the Court of Exchequer agreed in this view.

II.

The contract sued on is certainly a contract of indemnity, and is in fact a contract of insurance against loss by accidents and casualties; and if those terms include "loss by fire," as is contended, then it is a contract of insurance against loss by fire. In such case it is clear that the plaintiff in error is not liable for the entire loss, but only for its *pro rata* share of the same.

Home Ins. Co. vs. Baltm. W. H. Co., 93 U. S. 546.
No. Brti. Co. vs. London Co., 5 Chan. Div. 581.
Godin vs. London Co., 1 Burr. 589.
Fire Assn. vs. Merch. Co., 66 Md. 339.

III.

It is very clear that the contract sued on, so far as the Pullman Car Company is concerned, was satisfied by the furnishing from time to time for the use of the Railway Company, Drawing Room or Parlor and Sleeping Cars of the kind or description mentioned in the contract. It is equally clear that the Pullman Company could at its will and at any time substitute one Drawing Room or Sleeping Car for another, and that it was not bound for any definite period to allow the Railway Company the use of any particular car; and therefore it is manifest that the consideration of the contract which the Pullman Company agreed to deliver was not any specific object, but the use of objects of a certain species or sort. It was immaterial to the Railway Company whether this, that or the other specific car was furnished, and all that it could exact under this contract from the Pullman Company was a Drawing Room, Parlor or Sleeping Car of the kind or sort described in the contract. Hence this contract treats the cars to be furnished under it for the use of the Railway Company, not as certain and specific objects, but as things of a species or kind or sort, that is to say, a kind of things styled by civilians " fungible things."

Beaudry-Lacantinerie, vol. I., p. 718, No. 1206, dean and professor of Civil Law at Bordeau, in his recent treatise on Civil Law, divides movable things into:

1. Corporeal and incorporeal.

2. Consumable and not consumable, meaning by "consumable" those things which are consumed by the first use made of them (*quarum usus in abuso consistit*) whether naturally as wine, corn, oil, or civilly as money.

3. Fungible and non-fungible things. "Fungible things," says he, " are those which, according to the intention of the parties, can be exactly and identically replaced by others of a similar sort —*quarum una alterius vice fungitur*—in the minds of the parties one of the things is the equivalent of the other."

" It is then," he continues, " the intention of the parties which determines fungibility or non-fungibility. Thus I lend my Code to a friend. Here the book loaned will be non-fungible, it being our common intention that the book should be returned in specie and not by an equivalent; it is this Code I have loaned which is to be returned to me, and not another copy in its place;

I may have motives for the return of the specific Code loaned, because, for example, I may have annotated it. On the contrary, a bookseller not having on hand a book called for by a customer, in order not to lose a sale, borrows a copy from one of his confreres engaged in the same business; here the book is fungible; the borrower is not expected to return the identical book borrowed but a similar one, for such was the evident intention of the parties revealed by the circumstances at the time of the loan. Fungibility being dependent on intention, as a general rule, the most significant circumstance revealing the intention is the nature of the thing which is the object of the contract. The parties nearly always consider as fungible those things which are consumed by their first use, and the reverse is the case where the things are not consumed by their first use. It is for this reason we are tempted to confound the distinction between things fungible and not fungible, with things consumable and not consumable, but we must guard against this tendency. It is the nature of the thing which determines its consumability by first use, but it is the intention of the parties which determines its fungibility. It can happen that the will of the parties renders fungible a thing not consumable by its first use, as in the case of the bookseller mentioned above; and in an inverse sense, the will of the parties may render non-fungible a thing consumable by its first use; as if I lend fruits to a dealer to be placed on show in his store (*ad pompam et ostentationem*) and with the understanding that he is to return them in specie after the lapse of a specified time."

Prof. Goudsmit, Treatise on Roman Law, p. 96, tells us that this division of things into fungible and non-fungible is applicable only in matters of contract, as to ownership or other real rights they can never have for their object a kind or quantity as such, but only specific things.

S. Lecroix, Vol. 1, p. 308, says that fungible things are those which in the intention of the parties may be replaced by an equivalent of the same sort; and Demolombe, Vol. 9, p. 42, says that fungible things are those which can be exactly replaced one by the other, one of which can be paid for or restored, that is to say, can perform the function in juridical relations in place of the other, in such a way, that it is indifferent whether you have this or that one, the one being the perfectly identical equivalent of the other.

If I am correct in the view I have taken of the contract, it follows that the Railway Company never acquired any right or title in or to any specific car as lessee; the only right it acquired was the right of use in any car which the Pullman Company thought fit to furnish of the kind described in the contract, and therefore that the right of use acquired by the Railway Company was a fugitive right (if I may be allowed the use of that expression) and the duration of the right depended upon the duration of the use; when the use ceased, the right of control over the car which had been used reverted at once to the Pullman Company, whose right to replace it by another car immediately arose; and as against the right of the Pullman Company to withdraw from the use of the Railway Company any car not at the time in actual use, there was no corresponding and antagonistic right on the part of the Railway Company to detain in its possession or under its control any particular car which the Pullman Company might wish to withdraw.

This relationship between the parties shows that the accidents or casualties for which the Railway Company was responsible were only those accidents or casualties occurring at the time when any particular car was by virtue of the contract in the use of the Railway Company (by the *use*, I mean *actual use*) under circumstances which divested the Pullman Company at the moment of the accident, from its legal right of withdrawing it from the control of the Railway Company, and replacing it by another of the same sort.

Any other interpretation of the contract would throw the responsibility upon the Railway Company for the loss of a thing which it did not own, and had no right in at the time the accident occurred, because its right was purely a right in existence while the car was in actual use; it was only at that time that the right of use predominated over the right of the Pullman Company to withdraw the car from the Railway Company and replace it with another car, which replacement could be made by the Pullman Company at any time it chose until the locomotive was attached to the train for the purpose of hauling it.

Respectfully submitted,

THOS. J. SEMMES,

Of Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
DEC 13 1890
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1890. No. 118.

CHICAGO, ST. LOUIS, AND NEW ORLEANS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

PULLMAN SOUTHERN CAR COMPANY, DEFENDANT IN ERROR.

SUPPLEMENTAL AUTHORITIES.

I. In the contract sued on, although the Pullman Company agrees to "furnish drawing-room cars and sleeping cars, to be used by the railway company for the transportation of passengers, sufficient to meet the requirements of travel," there is no stipulation that the Pullman Company agrees so to do for any definite period of time. The furnishing of cars, the "*continuance of the contract*," therefore, depended on the *option* of the Pullman Company, and hence any failure or refusal on the part of the Pullman Company at any time so to furnish cars does not subject it to suit either for damages or for specific performance.

It is, therefore, clear that what is styled an agreement to furnish cars is a mere tender or offer so to do which could at any time be withdrawn; and it was only the actual acceptance by the railway company, from time to time, of cars tendered by the Pullman Company, manned and equipped, from time to time, which created contracts, as to the cars thus accepted, *while in use*. Hence, there was no *mutuality* in the contract sued on.

Thayer v. *Burchard, 99 Mass., 508.*
Geiger v. *Green, 4 Gill., 472.*
Dorsey v. *Packwood, 12 How., 126.*
Burton v. *R. R. Co., 9 Exchq., 507.*
Railroad Co. v. *Witham L. R. 9 C. P., 16.*

If the views above expressed be correct, the responsibility of the railroad company for the safety of the cars used by it terminated with that use at the end of each trip.

Respectfully submitted.

THOMAS J. SEMMES,
GIRAULT FARRAR,
Of Counsel for Plaintiff in Error.

U.S. Supreme Court
FILED.
NOV 10 1890
JAMES H. McKENNEY
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Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 118.

THE CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY, . Plaintiff in Error,

versus

THE PULLMAN SOUTHERN CAR COMPANY, ... Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

BRIEF FOR DEFENDANT IN ERROR.

HARGIS & EASTIN,
THOMAS F. HARGIS AND
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Counsel for Defendant in Error.

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STERLING B. TONEY,
Of Counsel.

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In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

BRIEF FOR DEFENDANT IN ERROR.

HARGIS & EASTIN,
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Counsel for Defendant in Error.

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vs.

THE PULLMAN SOUTHERN CAR COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

On April 5, 1879, The Pullman Southern Car Company defendant in error, which was then engaged in manufacturing and supplying to railroad companies, under lease, cars known as parlor and sleeping cars, and the Chicago St. Louis & New Orleans Railroad Company, plaintiff in error, which was then engaged in operating a line of railway between New Orleans and Chicago, entered into a written contract whereby the former leased to the latter company ten sleeping cars named therein, for a term of fifteen years, with the privilege on part of the railroad company to terminate the same sooner, upon conditions therein stipulated.

Among other terms of this contract, it was provided, in Article 6 thereof, that the plaintiff in error should furnish certain small supplies, therein specified, and should wash and cleanse the cars, and also renew and replace links and pins, bell cord and couplings, and couplings for air-brake hose, as the same might be necessary, at its own expense.

All of the principal repairs and renewals, however, made necessary from ordinary wear and tear, were to be done at the expense of defendant in error, and by Article 7 of said contract it was provided, that defendant in error should keep the cars contracted for in good order and repair, and should renew and improve them from time to time, at its own expense, so as to keep them up to the prescribed standard, "excepting repairs and renewals provided for in Article 6 of this agreement, and such as are made necessary by accident or casualty, it being understood that the railway company shall repair all damages to said cars of every kind occasioned by accident or casualty, during the continuance of this contract, except that the Pullman Company assumes all responsibility for any loss or damage occurring to said cars arising from defective heating apparatus, or lights furnished by it." (Record p. 5.)

By this same article of the contract, it was provided, that the railroad company, plaintiff in error, should actually make all these repairs and furnish the necessary labor and material therefor, both such as the defendant in error was to be responsible for, and its own, rendering bills monthly, for such as defendant in error agreed to do, and charging it therefor only the actual cost of labor and materials, with ten per cent. added to cover general expenses. (Record, p. 5.) But some time subsequent to the date of the contract, complaint was made by defendant in error to the president of the railroad company, of the manner in which repairs were made to the cars at the shops of the latter company at McComb City, where these repairs had been done under the contract, and thereupon, the president of the railroad company suggested that defendant in error should repair the cars itself, and, in order to facilitate it in this work, the plaintiff in error, set apart a portion of its passenger car depot shed in the city of New Orleans, to the exclusive use of defendant in error, for this purpose, and this part of the depot shed so assigned to defendant in error was fitted up by it at its own expense as a repair shop, and thereafter used as such, and was being so used on the morning of May 27, 1882, when a fire occurred, from some unknown cause, which destroyed the entire passenger depots and sheds of plaintiff in error, and also destroyed two of the sleeping cars named in and furnished under, the said contract or lease by defendant in error, to-wit: the "Louisiana" and the "Great Northern."

The car "Louisiana" had come in the evening before from a trip over the road of plaintiff in error, and had been placed by it on its tracks, under the shed used for storing such cars and other cars used by it when not in actual transit, at this terminus of its line, and was, after being cleansed and re-supplied by plaintiff in error, to go out that afternoon on another trip.

The car "Great Northern" was, at the time of the fire, also standing on the tracks of plaintiff in error and under its sheds, but in the repair shop above referred to, where it had been placed, by agreement of parties, in October 1881, for the purpose of being thoroughly renewed and repaired by defendant in error, and would have been ready to go into transit service on the road on the following day, after having first been properly manned and supplied as provided in said contract.

These cars were insured against fire, while contained in said depots and sheds, to the extent of ten thousand dollars on each, in the Royal and London & Lancashire Fire Insurance Companies, and the policy in each of said Insurance companies also covered two thousand dollars on sleeping-car supplies contained in the same building. These two policies amounting to twenty-four thousand dollars were afterward sued on, and the suits were compromised by the payment of nineteen thousand dollars to the defendant in error. When this compromise was effected, an agreement was entered into between defendant in error and the insurance companies, whereby it was stipulated in effect that suit should be brought against the plaintiff in error to charge it with the damages arising from the destruction of these cars under the above-mentioned contract, and that said suit should be prosecuted at the joint expense of defendant in error and the insurance companies, and that they should share equally, any recovery that might be had therein. (Record, p. 32.)

Such suit was accordingly brought in the name of defendant in error, against the plaintiff in error in the circuit court for the Eastern District of Louisiana, and, upon the trial there, a verdict was rendered in favor of defendant in error for the sum of nineteen thousand dollars; a judgment was entered upon the same, and from that judgment this writ of error was taken and the case brought here.

POINTS.

In the absence of any formal assignment of errors in the Transcript, or of any more specific designation of the errors relied on by appellant, we shall have to look, in ascertaining the questions to be discussed and in framing our argument, entirely to the bills of exceptions filed in the court below by plaintiff in error, and these, we will now briefly state, according to our understanding of them and in the order in which they appear in the record, as follows, to wit:

1. By bill of exceptions No. 1 (Record p. 15), the point is made that plaintiff in error was not, by the terms of its contract, responsible for damages to the car "Great Northern" happening to it while in the repair shop and in the hands of defendant in error for renewal and repair, under the circumstances surrounding it at the time of the fire; and that the Circuit Court, therefore, erred in instructing the jury, in substance, that plaintiff in error was responsible for these damages, though the car was in the repair shop, if it was still held under the contract and was there for purposes contemplated by the contract.

2. By bill of exceptions No. 2 (Record p. 18), the question is made that plaintiff in error was not responsible for the damages resulting to either of the cars from this fire, because neither of the said cars was, at the time, in its actual use or service though they were then held on the tracks of plaintiff in error for transit or repair; and that the Court erred in instructing the jury, in substance, that the said contract covered said cars while standing on the tracks of plaintiff in error, in its yard and under its sheds used for storing cars while not in transit, if they were so held for transit or repair under the contract.

3. By bill of exceptions No. 3 (Record, p. 19), the question is raised whether or not this damage or destruction by fire was a "casualty or accident", within the terms of said contract.

4. By bill of exceptions No. 4 (Record, p. 20), the question is raised whether the fact that defendant in error held fire insurance on these cars, and had been paid the sum of nineteen thousand dollars insurance on account of said loss, and that this action was being prosecuted under the agreement between it and the insurance companies (Record, p. 32) had any determining effect upon the rights of defendent in error to recover damages from plaintiff in error under the contract.

5. By bill of exceptions No. 5 (Record, p. 21) the question raised is whether or not the contract sued on is void as against public policy, because of the alleged monopoly provision contained in the 11th article thereof.

ARGUMENT.

FIRST: The first question to be discussed, being the one raised by bill of exceptions No. 1. involves the construction of the contract of April 5, 1879 (Record, p. 3, etc.), especially the seventh article of the contract (Record, p. 5) which obligated the plaintiff in error to repair and make good all damages to said cars "occasioned by accident or casualty," except those arising from defective heating apparatus or lights furnished by defendant in error, and the specific question is whether or not that obligation attached for the loss of the "Great Northern" under the circumstances surrounding it at the time of the fire. We may here say that it is not claimed that this fire originated from any defective heating apparatus or lights furnished by defendant in error, but it appears from the evidence that its cause is *unknown*,

The alleged error complained of under this bill of exceptions is based on the refusal of the court to charge the jury as requested by counsel for plaintiff in error. The instruction so asked for was as follows, to-wit:

"That, if the jury believe from the evidence that the defendant company by arrangement with the plaintiff company in the year 1879, set apart at their depot in the city of New Orleans a certain portion of said depot for the exclusive use and benefit of plaintiff as a repair shop, wherein the cars of the plaintiff mentioned in the contract sued on were to be repaired by plaintiff at its own expense, and the said space was enclosed, fastened and locked, and the keys thereof were kept by the plaintiff, or its agents, so that access thereto by the defendant or its agents was only such access as was necessary to enable the defendant company to take possession of repaired cars when tendered for service by the plaintiff, and that at the time of the fire, on the 27th of May, 1882, the car 'Great Northern' was in the said repair shop and had been there for a period exceeding six months for the purpose of being repaired, and that at the time of the fire, said car had not been tendered for service as a car completely repaired and equipped for service, to the defendant, although ready to be tendered, then that the jury must find that the defendant is not liable for the loss of the said car 'Great Northern,' or for any damage thereto by fire aforesaid."

That instruction was refused by the Court except with the following modification or addition:

"Unless the jury further find that the said car had been withdrawn from the dominion of the contract, and it was held according to the understanding of both parties for some other purpose—that is, for some other purpose than those of the contract." (Record, p. 17).

It further appears from the Record, pp. 17 and 18, that the Court in its general instruction to the jury upon this point, explained very clearly and very fully that the question of the liability of plaintiff in error, for this car situated and surrounded as it was at the time of this fire, depended upon whether or not it had been withdrawn from under the contract, and it said to the jury, among other things,

"If the jury find that there was a placing of the cars in the separate room or apartment with the intent, on the part of the plaintiff, to use them independently of the contract, and not under it, then the defendant would not be liable for their destruction.

> "If, on the other hand, the jury find that though there was a placing of the cars in the separate room or apartment, but with the intent to continue to use them under the contract, and to hold them so placed merely for the purpose of repair under the contract, and the defendant shared this intent, then the defendant would be responsible for their destruction by fire."

Now, it will be clearly seen that the test of responsibility applied by the Court, is whether or not this car had been placed in the repair shop for a purpose covered by the contract and with the intention of continuing to use it under the contract, and the question of fact as to this purpose and intent was expressly left to the jury. In finding a verdict against the plaintiff in error, the jury were compelled to have found, under this instruction, that this car *was* still held under the contract and for a purpose embraced by it, and that being so, we say there can be no doubt as to the correctness of the law as defined in that instruction by the Court.

That the Court below did not err in the construction thus placed by it on this contract, which holds the plaintiff in error responsible for the risk it has assumed, so long as the cars remained under the contract and subject to its terms and stipulations, admits of but little discussion.

The very language of the undertaking settles this question beyond controversy.

Article 7 of the contract (Record, p. 5), after imposing upon the defendant in error the duty of keeping the cars in repair, excepts certain repairs which it is agreed shall be done by the plaintiff in error, in this language, to-wit:

> "Excepting repairs and renewals provided for in article sixth of this agreement, and such as are made necessary by accident or casualty, it being understood that the railway company shall repair all damages to said cars, of every kind, occasioned by accident or casualty during the continuance of this contract, except, etc."

That the Court was correct in making the liability of the plaintiff in error for this car depend upon the question whether or not it was still held *under the contract*, and not for a purpose outside of the contract, is perfectly clear in the light of this strong language of the paper itself, which places upon plaintiff in error the responsibility for such damages "*during the continuance of the contract.*"

And that this car in the repair shop was held under the contract as fully as if it had been then in actual transit over the line of this road, is also perfectly clear, since the renewal and repairing of these cars was as much a part of the contract as actually running them over the line of railway.

This contract was a lease of ten sleeping-cars therein specified and named, and included in that number of cars so named was the "Great Northern." The contract imposed upon the respective parties certain reciprocal duties, and among the duties so imposed upon defendant in error was the renewal and the repairing of these cars, so far as rendered necessary by ordinary wear and tear, to an extent sufficient to keep them up to a stipulated standard. These renewals and repairs were both stipulated for and contemplated by the parties to the contract. It was known to both parties that these would become necessary, during this contract which extended over a term of years. They not only contemplated the temporary withdrawal of each and all these cars, perhaps, in turn, for the purpose of renewing and repairing them during this series of years, but it is shown by the evidence in the case that this particular car was so withdrawn by consent of both parties and placed in this repair shop which had been set apart voluntarily and gratuitously by the railroad company for this express purpose; and furthermore, that it was left there and retained for that purpose, during a period of at least six months, without any other car ever having been demanded, or ever having been substituted by the parties in actual use in its place. It was turned over by the railroad company to the Pullman Company and taken possession of by the latter for this very purpose and taken into the very place provided by the plaintiff in error for that purpose. It was still, during the course of these repairs, standing on the tracks of the plaintiff in error, and held there with the intention and the understanding on part of both parties to the contract, that it should go back into active service as soon as completed, and instead of being withdrawn from the dominion of the contract, it was so held under it that plaintiff in error could have demanded its restoration to active use as soon as the repairs were completed, and defendant in error could not have refused to put it back into active service, if it had chosen to do so.

But this question of fact was properly left to the jury by the instruction now under discussion, since they were told, in effect, that plaintiff in error was not responsible for the damages to this car, unless it was still held under the contract for a purpose within the contract, and they have by their verdict against the plaintiff in error settled this question.

The instruction of the Court to the effect that the plaintiff in error was responsible for the damages, unless the car had been withdrawn from the dominion of the contract, was clearly the law and the proper construction of this contract. As we have seen from the language of the contract above quoted, the responsibility of plaintiff in error was for "all damages to said cars of every kind occasioned by accident or casualty *during the continuance of this contract.*" The language is too plain and too broad to admit of any question that this responsibility attached so long as the cars were being used for any purpose contemplated by the contract. The undertaking extends "during the continuance of this contract," and so long as the cars were held under the contract *for any purpose contemplated by it*, this responsibility attached. As stated above, repairs and renewals were not only within the purview of the contract, and contemplated by both parties to the contract, but constituted one of the most important duties imposed upon defendant in error.

The liability of plaintiff in error for damages was fixed by the contract. That liability was limited only "during the continuance of the contract," and, as this car was then in the repair shop for a purpose embraced by the contract, was as complete as if the car had been in actual transit over the road.

There was clearly no error then, in this instruction which is based upon and strictly conforms to the language of the contract which made the plaintiff in error liable for these damages "*during the continuance of the contract.*"

SECOND: The next bill of exceptions taken by plaintiff in error is based upon the refusal of the Court to grant, without qualification, an instruction in these words, to-wit:

> "That if the jury believe that the two cars, Louisiana and Great Northern, were destroyed by fire at the depot of the defendant company while the said cars were not in actual use and service by the defendant company, then they must find a verdict for the defendant."

It will be seen that this instruction, as asked, is even broader and more objectionable than the preceding one. It embraces both these cars, and is based upon the simple fact that they were not then in *actual transit service* over the road of plaintiff in error, and what has been said with reference to the former instruction applies with still greater force to this.

The Circuit Court refused to give this instruction except with a qualification similar to that attached to the former instruction, making the question of liability depend upon whether the cars were or not still held under the contract, and did further, at the request of counsel for defendant in error, give this instruction to the jury, to-wit:

> "That said contract covers the said cars while standing on the tracks of the defendant in its yards and under the sheds used for stowing cars while not in transit, but while held for transit or repair on defendant's tracks, under the contract."

Now, we submit that the Court was correct, both in its refusal to give the instruction as asked for by plaintiff in error, and in giving the other instruction suggested by counsel for defendant in error.

As we have stated above, the plaintiff in error did not, by the terms of its contract, place any limitations or restrictions upon its undertaking to be responsible for such damages as these, except that they should occur "during the continuance of the contract." It did not stipulate that it should be so responsible only while these cars were in actual use or service, or while they were attached to one of its trains or in actual transit over its road, but the only limitation was that they should occur "during the continuance of the contract."

The only question, therefore, is, did this damage occur to these cars "during the continuance of the contract?" Were these cars then held under the contract for a purpose contemplated and embraced by its terms? We have shown that this contract contemplated renewing and repairing these cars, and their temporary withdrawal for that purpose from active transit service, and that, unless they were withdrawn for some purpose independent of, and foreign to, the contract, they were still within its operation and under its dominion.

This being true as to the car "Great Northern" which was then in the repair shop, it was certainly none the less true as to this other car, "Louisiana," which was, in fact, in actual service at the time, and had simply been left upon the tracks of plaintiff in error, under its sheds, where it was in the habit of storing these cars and its own cars for the time intervening between the arrival and departure of trains. It had not been taken possession of by defendant in error at all, had arrived but a few hours before, and was left there by plaintiff in error, on its own tracks, to be washed and cleansed and fitted out with supplies, preparatory to going out on another trip on that afternoon.

As to this car, "Louisiana," certainly there can be no serious contention that it had been withdrawn from the dominion of the contract. It can not be seriously contended that the this contract only covered these cars while they were in actual transit over the railroad of plaintiff in error. These temporary stoppages at the termini of the road, and this placing of the cars under the sheds of the road for a few hours, for the purpose of being cleansed and resupplied for another trip, were known to be necessary and were contemplated by both parties when the contract was made, and this car, which was so held by plaintiff in error to await the departure of another train going out in a few hours, was clearly held with all the terms and conditions of this contract applying to it.

The Circuit Court instructed the jury to that effect, and, in so doing, has clearly not erred, since the plain and unmistakable terms of the contract are that plaintiff in error shall be responsible for these damages "during the continuance of the contract" and with no other limitation as to time, or circumstances, or conditions, and especially, with no condition that it should only be liable while the cars were in actual transit over the road, as this instruction, as asked for, would imply.

THIRD: Bill of exceptions No. 3 is based upon an instruction given by the Court to the jury, upon request of counsel for defendant in error, in these words, to-wit:

"That a damage or destruction by fire is a casualty or accident, within the terms of said contract." (Record, p. 19.)

We deem it unnecessary to discuss this instruction at any great length, since the language itself and the plain meaning of the words used, especially when read in connection with the context, irresistibly carry with them the idea that damages by *fire* were intended to be embraced and included therein.

The words must be presumed to have been used in their ordinary sense and must be given their usual and ordinary signification. The word "accident" is defined by Mr. Webster as follows, to-wit: "An event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected; chance; casualty; contingency."

And, to show that its legal signification is not different, we find the same word defined in Rapalje and Lawrence's Law Dictionary, in this language, to-wit: "An extraordinary, unusual and unexpected event; an event happening from an unknown cause, or without human agency, or without the concurrence of the will of him who causes it."

It is sufficient to say that the word "casualty" is defined by these authorities in almost the same language and as being practically synonymous with the word "accident;" and, that this fire, occurring under the circumstances shown by the evidence in the case, comes clearly within the meaning of both these words, admits of no serious question.

The Record, p. 17, as to the origin of this fire, is brief, but pointed and clear, and is in the following language, to-wit:

"That the fire aforesaid which destroyed said depot shed, including the repair shop and cars aforesaid, originated from *a* *cause unknown*, about three o'clock in the morning of May 27, 1882."

It was, therefore, not only an unexpected and unforeseen and extraordinary event, but "an event which proceeds from *an unknown cause*," which brings it clearly and distinctly within the definitions as above quoted.

But further than this, the context of article 7 of the contract in which this stipulation is found, and the language accompanying and immediately following this stipulation, show beyond question that it was contemplated and intended by both parties that the danger of *fire* was to be embraced. Immediately following the language which imposes upon plaintiff in error the legal responsibility for the damages resulting from this "accident or casualty," we find the exception which makes the defendant in error responsible under certain contingencies for damages by fire. That exception is in these words:

> "Except that the Pullman Company assumes all responsibility for any loss or damage occurring to said cars arising from defective heating apparatus or lights furnished by it."

It is perfectly apparent from this language that the danger of fire was contemplated by the parties, and intended to be included within the meaning of the terms "accident or casualty." This exception shows that the Pullman Company was assuming the risk of *fire* resulting from defective heating apparatus or lights furnished by it, and from no other cause; and hence the risk of *fire from all other causes* was necessarily imposed upon the railroad company. This is plain because the *only* risk from defective heating apparatus or lights was a risk of *fire*, and this risk must necessarily have been in the minds of the parties in defining the risks to be assumed by the respective parties. The danger of fire and of loss therefrom was therefore in contemplation at the time, and this language is practically the same as though it had stipulated that the Pullman Company should be responsible for all damages resulting from *fire* arising from defective heating apparatus or lights, and that the railroad company should be responsible for all damages resulting from *fire* from any other cause.

The Circuit Judge was correct, therefore, in telling the jury that a fire, especially one resulting from *an unknown cause*, as this is admitted to have done, was "a casualty or accident within the terms of said contract."

FOURTH: The contention of the plaintiff in error, under its bill of exceptions No. 4, is that the fact that the defendant in error was partially insured against loss by fire and had been partly indemnified therefor by the insurance companies to the extent of nineteen thousand dollars, and that the action was being prosecuted for the joint benefit of the Pullman Company and the insurance companies, under the agreement found in the transcript (Record, p. 32), was either a bar to any recovery, or was at least to be taken in mitigation of damages.

The special instruction of the Court, to which exception is here taken by plaintiff in error, is in this language, to-wit:

> "That the insurance of the said cars by the plaintiff is *res inter alios acta*, which has no determining effect upon the rights of the plaintiff to recover here." (Record, p. 20.)

It will be observed that in each of these insurance policies there is a clause expressly stipulating that the insurance company should, in case of loss, be subrogated to the rights of the assured to demand satisfaction for the loss from any third person, in these words, to-wit:

> "15. In all cases of loss the assured shall assign to this company all his right to receive satisfaction therefor from any other person or persons, town or corporation, with a power of attorney to sue for and recover the same at the expense of this company." (Record, pp. 25 and 31.)

(*A.*) Now, we maintain, in the first place, that, under this agreement for subrogation, or even without it, upon well-settled principles of equity, these insurance companies, upon paying the Pullman Company the whole or a part of its loss, were entitled to maintain this action in the name of the Pullman Company, either in their own right alone, or jointly with the

Pullman company, and to recover of the railroad company the full amount of the loss, of which they would have been entitled to retain an amount sufficient to reimburse themselves, and the balance of which they would have held in trust for the Pullman Company; or, if the insurance companies had declined to prosecute such an action, then the Pullman Company itself could have maintained the action and have recovered the full amount of the loss from the railroad company, which recovery, to the extent of the sum paid by the insurance companies, would have been held in trust for them, and the balance would have gone to the Pullman Company to reimburse it in full for its whole loss.

Wood on Fire Ins., Vol. 2, Secs. 499, 500, 502.
Hart vs. Western Railroad Corp., 13 Metcalfe, 99.
Gracie vs. New York Ins. Co., 8 Johnson, 245.
Mason vs. Sainsbury, 3 Douglass, 61.
Clark vs. The Hundred of Blything, 2 Barn. and Cres., 254.
Yates vs. Whyte, 4 Bingham N. R., 272.

These principles of law are laid down by Mr. Wood in his text-book, in the following language, to-wit:

"Where the property insured is destroyed by the negligence of a third person so that the assured has a remedy against him therefor, the insurer, by payment of the loss, becomes subrogated to the rights of the assured to the extent of the sum paid under the policy." (Wood on Fire Ins., vol. 2, sec. 499.)

And again:

"If the assured receives full indemnity from the insurer, and does not choose to bring an action against the third person, the insurer may bring the action in the name of the assured; but if a recovery is had for an amount in excess of the policy, the balance must be paid to the assured." (Wood on Fire Ins., vol. 2, sec. 500.)

And again:

"Therefore, it follows that, in cases where the insured has also a remedy for his loss against a third person, he may pursue either the insurer or the wrongdoer or both at the same time, but he can have but one satisfaction for the loss. If he pursues the wrongdoer and collects the amount of his loss against him, he can not also pursue the insurer. Thereby the insurer is discharged. If he pursues the insurer, and secures satisfaction for his loss, in whole or in part, from him, while his remedy against the wrongdoer *is not thereby defeated*, yet he stands to the insurer in the relation of a trustee to the extent of the amount paid under the policy, and can not release the right of action, nor the action itself, if one has been commenced, so as to defeat the rights of the insurer to reimbursement from any recovery from such wrongdoer for the injury producing the loss." (Wood on Fire Ins., vol. 2, sec. 502.)

This same doctrine was laid down by Chief-Justice Shaw, of Massachusetts, in one of the earliest American cases on this subject, in these words, to-wit:

"Now, when the owner, who, *prima facie*, stands to the whole risk and suffers the whole loss, has engaged another person to be at that particular risk for him, in whole or in part, the owner and the insurer are in respect to that ownership and the risk incident to it, in effect one person, having together the beneficial right to an imdemnity provided by law for those who sustain a loss by that particular cause. If, therefore, the owner demands and receives payment of that very loss from the insurer, as he may by virtue of his contract, there is a manifest equity in transferring the right to indemnity which he holds for the common benefit, to the assurer. It is one and the same loss, for which he has a claim of indemnity, and he can equitably receive but one satisfaction. So that, if the assured first applies to the railroad company and receives the damages provided, it diminishes his loss *pro tanto* by a deduction from and growing out of a legal provision attached to, and intrinsic in, the subject insured. The liability of the railroad company is, in legal effect, first and principal, and that of the insurer secondary; not in order of time, but in order of ultimate liability. The assured may first apply to whichever of these parties he pleases; to the railroad company by his right at law, or to the insurance company in virtue of his contract. But, if he first applies to the railroad company who pay him, he thereby diminishes his loss by the application of a sum arising out of the subject of the insurance, to-wit, the building insured, and his claim is for the balance. And it follows, as a necessary consequence, that if he first applies to the insurer and receives his whole loss, he holds the claim against the railroad company in trust for the insurers. Where such an equity exists, the party holding the legal right is conscientiously bound to make an assignment, in equity, to the person entitled to the benefit; and if he fails to do so, the *cestui que trust* may sue in the name of the trustee, and his equitable interest will be protected." (Hart, etc., vs. Western Railroad Corporation, 13 Metcalfe, 99.)

The English cases above cited fully sustain the authorities quoted from, and it is, therefore, clear that, under the doctrine of subrogation, an action like this was maintainable against the railroad company either in the right of the insurance companies or of the assured, and in its name; and that a recovery of the full amount of the loss might have been had therein, which recovery, under the law, and without the special agreement, would have inured to the benefit of these two interested parties in such proportion as would reimburse the insurance companies for what they had paid and give the balance thereof to the assured to indemnify it in full for its loss; and that, therefore, the fact that the defendant in error was partially indemnified by the insurance companies before this action was instituted, could not in any manner affect or increase the extent of the liability of the plaintiff in error, and, as said by the Circuit Court, "had no determining effect" on the right of the defendant in error to recover.

(*B.*) And now, having shown, as we think, that the existence of this fire insurance and the payment of the nineteen thousand dollars in compromise by the insurance companies does not operate as a bar to the right of recovery against the railroad company, we further maintain that this can not even avail as a defense in mitigation of damages, or diminish the amount of the recovery; and, furthermore, that both the Pullman Company and the insurance companies, having a right of action against the railroad company to recover for the loss of these cars, they had also a perfect legal right to enter into the agreement (Record, p. 32) for the prosecution of the action on joint account, and for an equal division of the results thereof between themselves.

Merrick vs. Brainard, 34 New York, 208.
Weber vs. Morris & Essex R. R. Co., 35 New Jersey, 409.
Hayward vs. Cain, 105 Mass., 213.
Perrott vs. Sheaver, 17 Mich., 48.
Gales vs. Hailman, 11 Penn. St., 515.
Mobile & Montgomery R. R. Co. vs. Jurey, 111 U. S. Repts. 584
Collins vs. New York Cen. & Hudson River R. R. Co., 5 Hun. 504.

In the New Jersey case referred to, where a previous payment by the insurance company was relied on as a defense by the railroad company, which was also responsible for the damages suffered, it is said:

> "Notwithstanding such payment, an action will lie by the insured against the railroad company. The insurance is to be treated as a mere indemnity and the insured and insurer regarded as one person; therefore, payment by the insurer before suit brought can not affect the right of action." (Weber vs. Morris & Essex R. R. Co., 35 New Jersey L., 409.)

And in the New York cases referred to, the Courts of that State say it is no longer an open question that the wrongdoer, or third person, who is responsible for the damages in such a case, can not mitigate damages by evidence showing that the loss has already been paid to the party damaged, by an insurance company, and in the case in 38 Barbour, some very potent and striking reasons are given, in the opinion of the Court, why this should not be allowed. The Court there says:

> "The defendants did not insure, nor pay for insuring, the property, and the question is put to them with considerable force, by what right—upon what principle—they are entitled to any benefit from such insurance.
>
> "I insure my furniture in my house; a person either willfully or negligently sets it on fire; and when I demand compensation for my loss he insists upon his right to deduct the amount for which the property is insured. To say the least of it, the claim is wanting in modesty. But it is said that if I may retain the

insurance money, and recover the value of the goods of the wrongdoer, I am the gainer by the accident. If I am, it ill becomes the wrongdoer to complain of it. If I can not, in justice, retain more than the value of the property, which of the three parties concerned is entitled to the benefit of the deduction, the injured party, the wrongdoer, or the insurance company? Most clearly, the latter. If I have not been paid by the insurance company before I collect of the wrongdoer, I am limited in the amount I am entitled to demand of the company, to so much as will, in addition to the damages recovered, make good the loss. And if I have been already paid, the company is equitably entitled to recover so much of the damages as I have received over and above my actual loss." (Merrick vs. Brainard, 38 Barbour, 589.)

And here we find also a complete answer to the claim that may be made to the effect that the assured, if given the right to recover against both parties, may receive a double satisfaction. It is clearly shown that this can never be, for the reason that, if the assured has been fully indemnified by his insurance, and if the entire loss has thus been paid to him, then his entire recovery against the third person, being for the same amount, would all belong to the insurance company; and if, on the other hand, he has only been paid a part of his loss by the insurance company, then the latter will be entitled to the benefit of the recovery against the third person to an amount that would reimburse it, and the excess only would go to the party suffering the damage; so that, in any case, he would only receive one indemnity for his loss.

But, in the case at bar, the recovery against the railroad company was limited by the verdict of the jury to the amount paid by the insurance companies, and although, under the agreement, the assured is entitled to one-half of that amount, yet this, added to the amount he has already received from the insurance companies, will fall far short of reimbursing him for the full amount of his loss, which, under the record in this case, is established at $35,000.00, while the insurance companies are only reimbursed to the extent of one-half of what they have paid under their policies.

In the courts of Massachusetts also, this question has been thoroughly considered. We will quote from a single case in that State in which the assured had received from the insurance companies only a part of his loss, the auditor's report in the case showing the damages to have been greater than the amount of his insurance, and having a right of action against a third person for the damages, it appeared that he "agreed with the insurance companies to prosecute the action for their benefit, after making himself whole for his damages and that he was carrying on the action under that agreement."

The report of the case shows that:

> "The defendant asked the judge to rule that on this evidence the action could not be maintained; and the judge refused so to rule. The defendant then requested a ruling that, in the assessment of damages by the jury, the sum received from the insurance companies should be deducted from the amount of the damage caused to the building by the fire, which request also was declined. The defendant further asked the judge to rule that, as the suit was prosecuted for the benefit of the insurance companies, the amount of damages was limited to the sum the companies had paid over on the policies; but the judge instructed the jury that they might return as damages the sum found in the auditor's report, the same not being contradicted."

And it was held by the Supreme Court of Massachusetts that:

> "The transactions between the insurers and the owners of the property injured were matters in which the wrongdoer had no concern, and which do not affect the measure of his liability." (Hayward vs. Cain, 105 Mass., 213.)

And the Court in that case also referred to Clark vs. Wilson, 103 Mass., 219, in which this subject was considered at length by the Supreme Court of that State, and the law determined to be as above given, in a long and able opinion by Justice Gray.

And again in the Pennsylvania case, above referred to, we find this language used in a case involving similar questions, to-wit:

> "But what would be the value of the insurer's action in the

name of the shipper, if the Court could not prevent his own payment from being pleaded against him? It would see that the shipper did not receive double satisfaction, but it would allow the carrier to use the defense no further."

And in this same case, another principle of law is laid down which applies to the case at bar, in these words, to-wit:

"In this case, the insurer and the shipper could not sever; and the action was well brought, respectively for the use of each, in the name of him who had the legal title." (Gales vs. Hailman, 11 Penn. St., 520.)

But, these questions have been fully considered by this Honorable Court within a few years past, in a suit brought in the name of the shippers of cotton against the carrier for a loss by fire, and after the shipper had been paid for a part of that loss by the insurance company. That action was brought in the name of the shippers on the contract of shipment for the benefit of the insurer, but without averring the policy and its payment.

There were several grounds of defense relied on in that case, among them:

"2. That the action being brought in the name of the shippers without setting forth the policy, a recovery could not be had for the benefit of the insurer. 3. That in any event that recovery would be limited to the amount of the policy. 4. That the recovery in this form of action must be limited to the value of the goods, less the amount received from the insurers."

In its opinion in that case this Court uses the following language:

"But we are of opinion that the ground upon which this assignment of error is based is not tenable, which is that the recovery must be limited to the amount paid by the insurance company to the defendants in error, and that the burden is on the insurance company to show how much it paid. Although the suit is brought for the use of the insurer, and it is the sole party beneficially interested, yet its rights are to be worked out through the cause of action which the insured has against the common carrier. The legal title is in the insured, and the carrier is bound to respond for all the damages sustained by the breach of his contract. If only part of the loss has been paid by the insurer, the insured is entitled to the residue. How the money recovered is to be divided between the insured and the insurer is a question which interests them alone, and in which the common carrier is not concerned." (Mobile & Montgomery R. R. Co. vs. Jury, 111 U. S. Rep., 584).

This opinion effectually disposes of two of the questions under discussion in this case. It holds that the carrier in that case, who occupied a position similar to that of plaintiff in error in this case,

"Is bound to respond for *all* the damages sustained by the breach of his contract."

And then, in language which fully answers any objection to the *agreement* made between the insurers and the assured in this case, as to the division of the proceeds of recovery, it further says:

"How the money recovered is to be divided between the insured and the insurer is a question which interests them alone, and in which the common carrier is not concerned." (Mobile & Montgomery Railroad Company vs. Jurey, 111 U. S. Reports, 584.)

Upon what principle, then, can it be maintained that the agreement to divide equally the amount recovered from the railroad company in this action furnishes it any ground of complaint? Here was a legal right of action against the railroad company, in favor of the Pullman Company, arising under the contract between them and a legal liability on part of the railroad company for the full amount of the damages caused by the destruction of these two cars. A part of this loss was paid to the Pullman Company by the insurance companies, who stood, as we have seen from the authorities above, in the attitude of sureties, and who, as soon as they made this payment under their policies, were entitled to receive from the amount recovered of the railroad company a sum sufficient to reimburse themselves, while the Pullman Company was still entitled to the excess of such recovery to an amount sufficient to indemnify it for its whole loss.

The railroad company, under its contract, was liable for the whole loss, no matter whether the action against it was prosecuted by one or the other of these parties, nor whether the recovery was to be divided equally, or under the law. The contract of the railroad company fixed the extent of its liability, and fixed it at the full amount of the loss caused to the Pullman Company by this fire, and the Pullman Company could have sued and recovered that loss without ever applying to the insurance companies for any indemnity whatever under their policies. This agreement to divide the recovery equally, neither enlarged nor diminished the extent of the railroad company's legal liability. The only thing accomplished by this agreement for a distribution of the proceeds of the recovery equally between the parties is, that the insurance companies, instead of prosecuting the action at their own expense and first reimbursing themselves out of the recovery, for the amount they had paid under their policies, have agreed, as they had a right to do, in consideration of the compromise of their liability at $19,000.00, and the obligation of the Pullman Company to unite with them and prosecute this action jointly with them at joint expense, to divide equally with the Pullman Company any recovery that might be had. Surely there was nothing illegal in such an agreement and nothing that has worked any injury to the railroad company or in any manner enhanced its liability. The railroad company was liable under its contract for the full amount of the loss, without reference to the manner in which the recovery was to be apportioned; and even if the insurance companies had declined to participate in this suit at all, or to have any connection with it, still the railroad company would have been responsible to the same extent and a recovery could still have been had for the full value of these cars, though to the extent that the insurance companies had paid the assured for its loss, such recovery would have been held in trust by it for them. If these insurance companies have voluntarily surrendered some of their legal rights, or if they have made a bad bargain in agreeing with the Pullman

Company to prosecute this suit on joint account, which is not admitted, still it was a bargain which they had the legal right to make and one of which the railroad company can not complain, because it in no manner enlarged or affected the extent of its liability or the extent of the recovery against it. This agreement under which the suit was jointly prosecuted is, therefore, in the language of the instruction complained of, "*res inter alios acta*, which has no determining effect upon the rights of the plaintiff to recover here."

But, further on, in that same opinion, referring to the case of Gales v. Hailman, 11 Penn. St., 515, above cited, this Court uses this language:

"And upon the trial of such a case the court will restrain the carrier from setting up the insurer's payment of his part of the loss as partial satisfaction."

And further on it says:

"We are of opinion, therefore, that the recovery in this case might properly have been, as it was, for the entire loss sustained by the nominal plaintiffs *with* (which is clearly a typographical error for *without*) regard to the amount of insurance paid."

Now, it is perfectly clear from these authorities, and especially from this recent opinion of this Court on the subject, that it is no longer "an open question," as said in the New York cases, whether a third person, who is liable as a wrongdoer, or by contract, for damages to property, can, in an action brought in the name of the owner, rely in defense upon the fact that the owner has been indemnified, wholly or in part, from insurance on the property. And it is equally well settled that the proportion in which "the money recovered is to be divided between the insured and the insurer is a question which interests them alone."

FIFTH: As to the question raised by the bill of exceptions No. 5, we consider it unnecessary to enter into any discussion.

That exception is based upon the refusal of the Circuit Court to give to the jury an instruction asked by counsel for plaintiff in error in these words, to-wit:

> "That the contract sued on is void as against public policy, because of the monopoly provision contained in the eleventh stipulation of said contract and the jury is instructed to find a verdict for the defendant." (Record, p. 21.)

As to this, we need only say that there is no monopoly provision contained in the eleventh stipulation of the contract, as this instruction would imply. This was a contract by which plaintiff in error was to be furnished with the sleeping cars of the defendant in error, for a period of fifteen years; but by the fourteenth article of the same contract, the plaintiff in error was expressly given the option and election of terminating the contract at the end of five years, or at the end of eight years, or at the end of eleven years, upon certain conditions named in said fourteenth article. (Record, p. 7.) And there was nothing whatever in this whole contract to taint it with any monopolistic feature or to bring it in conflict with any rule of public policy.

It is respectfully submitted that the judgment of the Circuit Court should be affirmed.

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Mobile & Montgomery R. R. Co. vs. Jurey, 111 U. S. Repts., 584.

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OCTOBER TERM, 1890.

No. 118.

CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY, Plaintiff in Error,

versus

THE PULLMAN SOUTHERN CAR COMPANY, Defendant in Error.

BRIEF IN BEHALF OF THE DEFENDANT IN ERROR.

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Defendant in Error.

BRIEF IN BEHALF OF THE DEFENDANT IN ERROR.

Statement of Pleadings.

In September, 1886, the Pullman Southern Car Company brought its action in the Circuit Court of the United States for the Eastern District of Louisiana against the Chicago, St. Louis and New Orleans Railway Company, claiming from said Company the sum of thirty-five thousand three hundred ($35,300) dollars, with legal interest, as the value of two cars, "The Great Northern" and "The Louisiana," totally destroyed by fire in the depot of the defendant Company on the 27th day of May, 1882.

The action is based on a contract, in writing, annexed to and made part of the petition, of date the 5th day of April, 1879; and the petition avers, that under that contract, the two cars in question, among others, were furnished to the defendant Company, were accepted by the defendant Company, and thereafter remained in the possession of the defendant Company in service under the contract, in the entire custody and control of the defendant, and were in such custody and control in the defendant's depot on the 27th day of May, 1882, when the said depot, together with the said cars, were destroyed by fire; that the contract provides for the payment by the defendant of all damages to the cars of every kind occasioned by *accident or casualty* during the continuance of the contract, except those losses, or damages, occurring to cars arising from defecting heating apparatus or lights furnished by it; and that the accident or casualty in question, to-wit: consumption by fire, did not occur to said cars from defective heating apparatus, or from lights furnished by the plaintiff.

The petition avers that the loss and damage occurring to the plaintiff by the said accident or casualty, to-wit: the consumption of the cars by fire, was the sum of thirty-five thousand three hundred ($35,300) dollars, because it would cost the sum of thirty-five thousand three hundred ($35,300) dollars to repair or rebuild the said cars, and that the defendant had refused to repair or rebuild said cars according to the contract.

The defendant answered, admitting the agreement, and admitting that the plaintiff furnished to this defendant and placed in service of this defendant's road, as provided in said agreement, among others, two (2) certain sleeping cars, styled "The Louisiana" and "The Great Northern."

The answer then goes on to aver, that thereafter the plaintiff "removed from service on the defendant's road the sleeping car styled 'The Great Northern,' for the purpose of repairing, refitting and repainting the car. That said removal was made to the repair shop of the plaintiff Company, and that said car was never thereafter delivered to the defendant, nor did the defendant ever thereafter have the possession, use or service of said sleeping car in any manner or form."

The answer further avers certain facts with reference to the repair shop in which the said car was placed, and sets up the circumstances of the fire, which it claims originated in the repair shop of the plaintiff through the carelessness and negligence of its officers and servants, and that the fire spread from the paint shop to the depot of the defendant, and entirely consumed the depot and caused the defendant damages in the sum of ten thousand ($10,000) dollars, which the defendant claims in reconvention against the plaintiff.

The answer further avers that the plaintiff had caused these two cars to be fully insured against loss by fire to the full amount claimed in the petition, and shortly after the loss and destruction of the cars, the plaintiff made due proof of loss, and that such loss was by the Insurance Company adjusted and paid to the Pullman Company prior to this suit.

The answer further denies that it covenanted and agreed to be liable for any loss or damage arising from any cause or causes wholly within the control of the Pullman Company, and that the object, intent and meaning of Article 7 of the agreement, to provide for accident or casualty, was to provide for accident or casualty occurring, or liable to occur while said cars were in transit or attached to the defendant's trains for transit or transportation, or while the same were actually in the employ, use or service of the defendant, and that by the words "accident or casualty," used in said agreement, it was not intended to include, and did not, and does not include loss or destruction by fire.

On these issues the parties went to trial, and there was a verdict and judgment in favor of the plaintiff in the sum of nineteen thousand ($19,000) dollars, with interest from judicial demand.

At the trial the defendant took five (5) Bills of Exception.

The substantial facts, upon which this controversy turns, are set forth in the Bill of Exception No. 1, and are as follows:

"That the contract sued on and made part of the petition was entered into between the parties, as averred, on the 5th day of April, 1879; that the ten (10) Cars mentioned in said contract were furnished to the defendant Company, and were put into operation on its line of railroad under said contract, among them being the cars 'Louisiana' and 'Great Northern;' that both of said cars were totally destroyed by fire on the morning of the 27th of May, 1882, at about three (3) o'clock in the morning; that evidence showing their value at that time was adduced; that at the time of said fire the car 'Louisiana' was standing on the tracks of the defendant Company in the City of New Orleans, one of the termini of its railroad, under a depot shed belonging to the defendant Company, and used by it to store cars when not in actual transit, both cars belonging to it as well as the cars belonging to the Pullman Company, which shed was called by the employees of the defendant Company 'The Pullman Shed.' That said car 'Louisiana' had come from a trip over the line of the defendant road, attached to one of its trains at 3:15 o'clock on the evening of the 26th of May, and was placed by the defendant in said depot shed, where it was usual to place its own and the Pullman cars when not in transit, and that said car was to go out again on another trip, attached to the defendant's train, at six o'clock on the evening of the 27th of May, and was to be manned and equipped with the employees of the plaintiff, mentioned in the contract sued on, and supplied by the defendant with the stores provided for in the contract sued on, on the day of the 27th and prior to her departure. That at the time of said fire the car 'Great Northern' was standing under the same depot shed, the whole of which was consumed by said fire, but in a different part thereof, to-wit: in the part thereof known as the 'Pullman Repair Shop.'

"That the facts with reference to the Pullman Repair Shop were these: Subsequent to the contract of 5th of April, 1879, complaint was brought by the Pullman Company to the President of the defendant of the manner in which repairs were made to the Pullman cars at the defendant's shops in McComb City, a point on the line of the defendant's road about one hundred and five (105) miles above the City of New Orleans, who suggested that the Pullman Company should repair the cars itself. Thereupon, in order to facilitate the plaintiff in the repair of said cars, furnished under the contract sued on, a part of the passenger car depot sheds of the defendant in the City of New Orleans was set apart to the exclusive use and control of the plaintiff, who fitted up that portion assigned to it, at its own expense, one part as a linen room, one as a carpenter shop, one as an upholstery room and one as a paint shop, and enclosed the same with partitions and kept the same locked and the keys in the possession of its employees. The employees of the defendant had no right of access to this repair shop. The tracks of the defendant extended into this repair shop and across these tracks were folding doors closed by an iron bar inside. For the use of this shop the plaintiff did not pay any rent or compensation to the defendant. The watchman over the whole premises was maintained by the defendant. With the permission and consent of the defendant, the plaintiff had on one or two occasions repaired and varnished, inside of the shops, cars not covered by this contract, but assigned to other railroads. That the exact spot occupied by the Great Northern at the time of the fire was, that said car was standing on the tracks of the defendant in the paint shop enclosed by the barred folding doors as aforesaid. That said car had been in said shop since the month of October, 1881, undergoing repairs, refitting and revarnishing, and during the progress thereof her name had been changed to the "Chatawa." That she would have been ready to go into transit service on the road on the following day when properly manned, equipped and supplied as provided in the contract sued on, if she had not been destroyed on said morning of May 27th, 1882. That there was no evidence that any other car had been placed on the defendant's road in actual transit service in the place of the said car Great Northern while it was undergoing said repairs. That at various times during the existence of said contract sued on, the plaintiff had taken some of the ten (10) cars furnished thereunder to the shops in St. Louis, Missouri, and Pullman, Ills., entirely off the defendant's road, in order to be repaired, so as to keep them up to the standard required by the contract.

"That the fire aforesaid which destroyed said depot shed, including the repair shop and cars aforesaid, originated from a cause unknown, about three (3) o'clock in the morning of May 27, 1882, in said repair shop.

"The question as to the negligence on the part of the plaintiff as to the cause of the fire was left to the jury specifically, and it is, and was a part of the Court's instructions, and the jury were instructed by the Court that if the fire was caused by the plaintiff's negligence, the plaintiff could not recover."

Thereupon the counsel for the defendant Company requested the Court to charge the jury as follows, to-wit:

"That if the jury believed from the evidence that the defendant Company by arrangement with the plaintiff Company in the year 1879, set apart at their depot in the City of New Orleans a certain portion of said depot for the exclusive use and benefit of the plaintiff, as a repair shop, wherein the cars of the plaintiff mentioned in the contract sued on, were to be repaired by the plaintiff at its own expense, and the said space was enclosed, fastened and locked, and the keys thereof were kept by the plaintiff or its agents, so that access thereto by the defendant or its agents were only such access as was necessary to enable the defendant Company to take possession of repaired cars when tendered for service by the plaintiff, and that at the time of the fire on the 27th day of May, 1882, the car Great Northern was in said repair shop, had been there for a period exceeding six (6) months, for the purpose of being repaired, and that at the time of the fire said car had not been tendered for service as a car completely repaired and equipped for service to the defendant, although ready to be tendered, then that the jury must find that the defendant is not liable for the loss of the car Great Northern, or for any damage thereto by fire."

But the Court refused the said instructions except with the following modification or addition:

"Unless the jury further find that said car had been withdrawn from the dominion of the contract, and it was held according to the understanding of both parties for some other purposes, that is, for some other purposes than this contract."

To which refusal, counsel for the defendant, took a bill of exception to the addition or modification.

And the Court further, in its general charge on this subject, charged the jury: "That it was undoubtedly competent for the parties to this action to have withdrawn their cars from the dominion of the contract, but to constitute such withdrawal there must be the intent of the plaintiff to retain them for some purpose other than to continue their use under the contract; and if the jury find that there was a placing of the cars in a separate room or apartment with the intent on the part of the plaintiff to use them independently of the contract, and not under it, then the defendant would not be liable for their destruction. If, on the other hand, the jury find that though there was a placing of the cars in a separate room or apartment, but with the intent to continue to use them under the contract and to hold them, so placed, merely for the purpose of repairing under the contract, and the defendant shared this intent, then the defendant would be responsible for their destruction by fire. In determining this question, the jury will consider all of the facts and circumstances established, including the fact that the cars remained on the tracks of the defendant; and will further consider whether the defendant is shown to have any relations to these cars except under the contract."

The second bill of exceptions was taken to the refusal of the Court to give the following charge requested by the counsel for the defendant:

"That if the jury believe that the two (2), cars, Louisiana and Great Northern, were destroyed by fire at the depot of the defendant Company while the said cars were not in actual use and service by the defendant Company, then they must find a verdict for the defendant."

And the Court said, "I refuse that instruction, provided you find there were being repaired under the contract.

"That is the test which the Court gives you all the way through, whether these cars, according to the meaning of the parties, were, or were not under the contract. The contract providing for repairing as well as running."

And the plaintiff's counsel further excepted to the following charge given by the Court to the jury, at the request of the plaintiff's counsel, with the modification added thereto by the Court, to-wit:

"That the contract covers the said cars while standing on the tracks of the defendant in the yards, and under the sheds used for stowing cars while not in transit."

The modification to this charge being: "Gentlemen, I add to that, so as to make it clear, and the meaning more specific, 'but while held for transit or repaïr on its track under the contract,' so that the instruction will read, that said contract covers the said cars while standing on the tracks cf the defendant in its yards and under the sheds used for storing cars while not in transit, but while held for transit or repair on defendant's tracks, under the contract."

The defendant's third bill of exceptions is to the charge of the Court to the jury, to the effect that "a damage or destruction by fire is a casualty or accident within the terms of the contract sued on."

The defendant's fourth bill of exceptions is to a charge given by the Court to the jury, that "the insurance of the cars given by the plaintiff is *res inter alios acta*, which has no determining effect upon the rights of the plaintiff to recover here."

The defendant proved, in accordance with the averments of its answer, that the plaintiff had insured these two (2) cars, and had been paid as damages by the insurance company under said policies the sum of nineteen thousand ($19,000) dollars, and that this suit was prosecuted under an agreement between the said insurance company and the plaintiff, to the effect that the Pullman Company was to sue the Chicago, St. Louis and New Orleans Railway Company for the value of these cars under the contract aforesaid, and that one-half of the sum recovered in such suit was to be paid over to the insurance company, and the other half was to be paid over to the Pullman Southern Car Company.

The fifth bill of exceptions was to the refusal of the Court to charge the jury that the contract sued on is void as against public policy, because of the monopoly provision contained in the 11th stipulation of said contract; and for that reason that the jury was to be instructed to find a verdict for the defendant.

In this Court, the plaintiff in error has made, as the brief states, three (3) assignments of error; but an examination of the first assignment shows that it embodies in itself two or three assignments which would have to be discussed separately.

ARGUMENT.

As we understand this case, it is entirely unnecessary to follow the plaintiff in error in his labored discussion as to what kind of a contract the one sued on is.

The only questions which remain for your Honors to decide are, whether the law arising upon the facts, in issue between the parties, was correctly given to the jury by the lower Judge. There was no demurrer to the petition filed in the court below. There was no request by the defendant to the court that the case should be taken away from the jury and decided by the court upon the facts adduced.

The only real issues in the case, as presented on the pleadings and the evidence, are:

1st. Is a destruction by fire an accident or casualty within the terms of the contract sued on by the Pullman Southern Car Company?

2d. Does the contract sued on mean, as claimed by the defendant, that its liability for accident or casualty arose only when the cars furnished to it by the defendant were attached to its trains in motion, or about to go into motion, supplied by the defendant with certain things that it was bound under the contract to supply the cars with, and supplied by the plaintiff with an employee whom it was obliged under the contract to furnish; or, to quote the language of the Judge: "Does said contract cover the cars while standing on the tracks of the defendant, in its yards, and under the sheds used for storing cars while not in transit, but while held for transit on the defendant's tracks under the contract?"

3d. Does the insurance of these cars by the Pullman Company against loss by fire in the depot sheds of the defendant, the collection of the amount of the said insurance from the companies, and the agreement with the companies paying said insurance to prosecute this cause against the defendant, and to divide between them whatsoever sum may be realized from said suits, defeat the right of the plaintiff to recover?

4th. Is this whole executed contract void as between the parties so as to prevent either the one or the other from enforcing any of its stipulations or agreements, because there is contained in it a clause whereby the plaintiff in error binds itself to give the Pullman Company the exclusive right for fifteen (15) years to furnish for the use of the Railroad Company drawing room, parlor and sleeping cars on the passenger trains of the Railway Company?

We prefer to discuss these questions in the order in which we have named them, and in the manner in which we have formulated them, rather than in the manner in which the plaintiff has formulated them:

First. Is a destruction by fire an accident or casualty within the meaning of the contract between the parties?

The seventh (7) article of the agreement provides:

"The Pullman Company hereby agrees that it will keep the cars furnished under this contract in good order and repair, and will from time to time renew and improve the same, when necessary, at its own expense, and will keep said cars up to the average standard of the best and most approved sleeping cars running on any railroad in the United States which use, an equal number of sleeping cars, excepting repairs and renewals provided in article 6 of this agreement, *and such as are made necessary by accident or casualty, it being understood that the Railway Company shall repair all damages to said cars of every kind occasioned by accident or casualty during the continuance of this contract, except that the Pullman Company assumes all responsibility for any loss or damage occurring to said cars, arising from defective heating apparatus or lights furnished by it.*"

The obligation assumed by the defendant was, to "repair *all* damages of *every* kind occasioned by *accident* or *casualty* during the continuance of the contract," except those assumed by the Pullman Company.

In the first place, the destruction of a material thing by fire from an unknown cause, and without default of any known person is, on general principles of common law and common sense, an accident or casualty, and is in fact the most usual accident or casualty foreseen and provided for in the business transactions of men.

In the second place, it is clear that the special assumption by Pullman Company of all responsibility for loss or damage occurring to said cars, arising from defective heating apparatus or lights furnished by it, is, of itself, conclusive proof that FIRE was one of the accidents or casualties within the contemplation of the parties, because fire is the only consequence that could arise from defective heating apparatus and defective lights, and a fire so caused would be presumably the fault of the Pullman Company.

The Pullman Company, therefore, assumes the risk of fire, or, if possible, any other damage, that might accrue from defective lights or defective heating apparatus, leaving upon the defendant the assumption of the risk for fire not caused by defective heating apparatus or defective lights.

In the third place, it is a matter of public notoriety that in a wreck or collision a train is as often destroyed by fire resulting from the collision as it is destroyed by the shock of the collision itself, and that as much damage to property and as much loss of life are the incidents of such fires so occasioned as are incident to the derailment of the cars.

If fire was not an accident or casualty, within the meaning of this contract, then it would make no difference upon the obligation of the parties where the said fire might occur, whether it occurred in the depot of the defendant, or whether it occurred as the result of a derailment, or whether it occurred while the car was in motion, and resulted from sparks from the locomotive, or of fire alongside of the track, communicating to the cars.

This interpretation would make the parties exclude from the broad, unlimited terms of their contract, that which was generally, and absolutely, in its nature, one of the most ordinary and usual incidents of damage to the cars of a railway company.

It is clear from the terms of the contract that the obligation for loss by fire was divided between the parties, the Pullman Company assuming all such loss as was occasioned by defective heating apparatus and defective lights furnished by it, and the Railway Company assuming all such loss as might be occasioned by fire from all other sources, excluding, of course, the direct fault of the Pullman Company.

And it is further clear that, in order to make itself whole, the Pullman Company, in view of this divided obligation with reference to fire, took the precaution to insure these cars additionally while in the depot sheds of the defendant Company.

Second. If fire, not caused by defective heating apparatus or defective lights furnished by the Pullman Company, is a casualty or accident within the meaning or the contract between the parties, then what is the extent to which the contract between the parties goes? and to quote again the language of the Court: "Does the contract cover the cars while standing on the tracks of the defendant in its yards and under the sheds used for storing cars while not in transit, but while held for transit or repair on the defendant's tracks under the contract?"

The Court will notice from the charge of the Judge the bills of exception and the statement of facts, that there is a great difference between the cases presented by the car Great Northern and the car Louisiana.

The car Louisiana, as shown by the bills of exception, was in active use from day to day on the line of the defendant Company. This car had been brought into the defendant's own depot sheds, at one of its termini in the City of New Orleans, on the evening of the 26th day of May, and was stored in the shed where the defendant kept its own cars and the Pullman cars to be held in readiness to go out upon another trip on the following day at six (6) o'clock in the evening.

In this interval it was the duty of the defendant, under the contract, as provided by Section 6 thereof, to wash and cleanse this car, to furnish it with lubricating material, to provide ice, fuel and material for lights, to inspect the car, and if necessary, renew and replace the links and pins, bell cords, couplings and couplings for air brake hose, and to see that the said car was a fit vehicle to be used on its road for the carrying of passengers under its obligations as a common carrier.

These were the duties imposed upon it toward the public by law, apart from the stipulations of the contract as between the parties thereto, and any failure on the part of the defendant Company to perform these necessary services with reference to this car would have made this Company responsible in damages to the passengers, as the contract of carriage, in all cases, is primarily with the Railroad Company and not with the Pullman Car Company.

Pennsylvania Co. vs. Roy, 102 U. S. 451.

Thorpe vs. N. Y. and H. R. R. Co., 76 N. Y. 402.

Williams vs. Palace Car Co., 40th Louisiana Annual, 417.

The only obligation, in this same interval, that the Pullman Company was under with reference to this car, was to furnish one or more employees upon said car, whose duty it was to collect fares, for the accommodation furnished in the cars, and generally to wait upon passengers therein, and to provide for their comfort. (See contract, Section 2.)

And these employees of the Pullman Company, as provided by Section 5 of the contract, were to be governed by and subject to the rules and regulations of the Railway Company which were adopted from time to time for the government of its own employees.

As regards the car Great Northern, the facts were that she was standing on the tracks of the defendant Company, under the same depot shed as the car Louisiana, but in a different part thereof, which had been set aside under particular circumstances, detailed in the bills of exception, as a repair shop for the Pullman Company, and she was also ready to go into service after the things had been done upon her that were required to be done upon the Louisiana. She had been in this shop sometime undergoing repairs and repainting, and her name had been changed to the Chatawa.

What are the facts as shown by the bill and the contract with reference to this shop?

The contract provides (Section 7), "That the Railway Company agrees at all times, when requested by the Pullman Company, to make promptly such repairs to the cars furnished under this contract as may, from time to time, become necessary, and to make without request such repairs as may be required to insure their safety, rendering bills monthly to the Pullman Company for repairs to the Company's cars, and charging for the same only the actual cost of material and labor expended on such repairs, with an addition of ten (10) per cent., to cover generally expenses, all settlements and payments for mileage, and repairs to be made monthly between said Companies."

By the first part of Section 7, it appears that the Pullman Company obligated itself to keep the cars furnished under this contract, in good order and repair, and from time to renew and improve the same when necessary, at its own expense; to keep said cars up to the average standard of the best and most improved sleeping cars, running on any railroad in the United States, which uses an equal number of sleeping cars, excepting repairs and renewals provided for in Article 6, and such as are made necessary by accident or casualty.

The clear interpretation of this contract is, that the obligation was on the Pullman Company to pay for such repairs as were necessary to keep cars up to standard and to insure their safety, excluding repairs, mentioned in Article 6, and casualty or accident repairs, and that the defendant Railway Company agreed to do these repairs whenever they were necessary, without request, and whenever requested to do so by the Pullman Company under this contract, and to charge the Pullman Company certain sums therefor.

The Bill of Exceptions shows that the repair shop in question arose out of a controversy between the two Companies as to the manner in which the Pullman cars were repaired by the defendant Company at its shop near the City of New Orleans; and that, as a consequence of this controversy, the President of the defendant Company told the Pullman Company to make its own repairs, and to that end, and for that purpose, set aside a portion of the depot shed in the City of New Orleans, known as the "Pullman Repair Shop," and gave the Pullman Company complete control of that Pullman Repair Shop, but only for the purpose of making repairs to the Pullman cars under this contract and as provided in the contract.

It does appear that cars belonging to other railroads were several times repaired in this shop; but it also appears that this was done with the consent of the defendant Company; and it also appears that upon some occasions the Pullman Company took some of the cars mentioned in this contract, and not the cars at issue in this case, entirely off the line of the defendant's road to its own shops, to be repaired there.

However, these exceptional cases have no power to change the fact as stated in the Bill, that this repair shop was established in the defendant's depot as part of its depot for the purpose of enabling the Pullman Company to make repairs upon cars under this contract, and as part of the contract.

Under these circumstances the court charged the jury, and we submit correctly, that the question for them to decide was, what was the intention of the parties relative to the placing of this car Great Northern in this shop? Was it to withdraw the car entirely from under the dominion of the contract between the parties, or was it for the purpose of repairing the car under the contract, and for the purposes of the contract?

And saying to the jury that if the car was, by the consent of the parties, placed in this shop with the intention of taking it from under the dominion of the contract, then there was no liability upon the defendant, but that there was such liability upon the defendant if the car was placed in this shop on the defendant's tracks for the purpose of being repaired under the contract, for the reason that the contract provides both for the running of the cars and for their repair.

There is an attempt made in the brief to make it appear as if there had been some question in the court below as to whether the defendant Company had custody and control of these cars at any time, or whether there had been any assignment by the Pullman Company of these cars to the defendant under this contract, and an acceptance thereof by the defendant.

We are very much surprised at this argument, as no such question appears on the bills of exception, and as no such question could have arisen in the Court below in view of the statements contained in the defendant's answer, wherein it admits that the plaintiff "*furnished to this defendant and placed in service on this defendant's road, as provided in said agreement, among others, two certain sleeping cars styled the 'Louisiana' and the 'Great Northern,' and that sometime thereafter, to-wit., on about the — day of ———, 1882, the plaintiff removed from the service of this defendant's road one of said sleeping cars, to-wit: the said sleeping car styled the Great Northern, for the purpose of repairing, refitting and repainting said sleeping car, as provided in said agreement, and that said sleeping car Great Northern was removed to the repair shop of said Pullman Company, and the same was never thereafter delivered to this defendant, nor did this defendant ever thereafter have the possession, use or service of such sleeping car in any manner or form.*"

There never was at any time, from the beginning to the end of this case in the lower court, any question as to what these admissions in the answer meant, and never at any time any question as to the facts averred in the petition that the ten cars mentioned in the contract were delivered to the Company under the contract, were accepted by the Company as satisfactory, and remained in the service of the Company during the whole time in question, and under the custody and control of the Company during the whole of said time. The only point in the case being, as stated in the bills of exception and in the answer, that the defendant claimed that the placing of this car, under the circumstances stated, in the Pullman repair shop, was a removal of the car from its custody and the taking of the car by the Pullman Company out from under the contract, so that the defendant was not responsible for its destruction. And this contest is the reason why the Court charged the jury that the contract covered both running and repairing while standing on the plaintiff's tracks in the defendant's depots, while waiting for transit, as well as running on the defendant's tracks in transit.

For these reasons, and in view of the positive statement contained in the bill of exceptions that the ten cars mentioned in said contract *were furnished to the defendant Company and were put into operation on its line of railroad under said contract,* among them being the cars Louisiana and Great Northern, we repeat our statement that we are surprised at the argument contained in the brief to the effect that there is nothing in this record to show that the cars were ever delivered to the defendant Company or put in its possession or under its control.

We submit that it becomes apparent, from the consideration of the relations of the parties to the contract, and the stipulations thereof, that the Railroad Company was necessarily to have and keep possession, control and custody of all the sleepers during the continuation of the contract, and therefore that the Court was right in charging the jury, that "the contract covers the cars while standing on the tracks of the defendant in its yards and under the sheds used for stowing cars while not in transit, but while held for transit or repair on defendant's tracks under the contract."

In the nature of things, a sleeping car company, whose business it is "to hire cars to railway companies and to be used and employed on and over the lines of the roads of said railway companies, and receiving therefor income and revenue by the sale to passengers of seats, berths and accommodations therein" (see preamble to contract, R. p. 3), cannot be expected to have tracks, depot sheds, and storing places for cars while not in transit at every point on the line of every railroad it does business with, at which trains are made up with sleeping cars attached. The hiring company is expected to have all these facilities, as they are the necessary paraphernalia of a railroad. The hiring company makes up trains with its own motive power; inspects, washes and repairs cars with its own employees; fixes its own schedules of arrival and departure; moves cars about in its yards, and stows them according to its own convenience. If a sleeper is to go out on every train, as this contract provides, the hiring company must necessarily have custody and control of the sleepers as much as it has custody and control of its own ordinary passenger cars. The contract clearly provides for this complete custody and control as much when the cars are stowed in the sheds and yards of the hiring company, awaiting transit or repair, or undergoing repair, as when they are being drawn over the tracks on a schedule trip from point to point. From the time the cars are put on the hiring company's road to be hauled on its trains, the Pullman Company has nothing to do with them except to furnish one or more employees to wait on the passengers, and to collect fares, and these employees are subject to all the rules and regulations of the Railroad Companies' employees. The cars come and go as the Railroad Company says. They make long or short trips, just as it chooses. They are cleansed, washed, lubricated, inspected, repaired and supplied with fuel, ice, oil, etc., just as the Railroad Company may choose to do it. On none of these subjects has the Pullman Company anything to say or to do, except to request that repairs not necessary to ensure safety, be made by the Railroad Company (R. p. 5, Contract, Section 7), and to cleanse and repair, itself, after putting the Railroad Company in default (R. p. 6, Contract, Section 13).

Third. As regards the insurance matter, your Honors will notice that the defendant pleaded the policies of insurance on these two cars, and the payment of loss thereunder, as a defense against the right of the plaintiff to recover at all. There is no claim in the answer that the question of insurance had anything to do with the question of the value of the cars, or with any question of a proportionate right of recovery.

No such question of value or proportionate right of recovery was raised on the trial. None appears on the bill of exceptions. Therefore none can now be raised in this Court.

Doe vs. Watson, 8 How. 263.

Wilson vs. McNamee, 102 U. S. 572.

Springer vs. U. S., *Ibid.* 586.

Clark vs. Fredricks, 105 U. S. 4.

The charge of the court was therefore strictly responsive to the issue. That issue being, "Does the insurance of the cars, the payment of nineteen thousand dollars to the plaintiff by the insurance companies, and the agreement between them that this suit is to be prosecuted in the name of the Pullman Company for the joint benefit of it and the insurance companies, bar the right of the plaintiff to recover against the defendant?" the Court charged the jury, that "the insurance of the cars by the plaintiff is *res* *inter alios acta*, which has no determining effect upon the rights of the plaintiff to recover here."

If the defendant had agreed to be liable to the plaintiff for any damage to the cars by fire, that was a *primary liability* on which an insurance company, subsequently taking a risk on the same cars, would have the right to recover in the name of the contracting party.

This right is given the insurer as against a common carrier (Hall & Long vs. R. R. Co., 13 Wall. 370); as against a railroad committing a tort and destroying insured property (Hart et al. vs. Western Railroad, 13 Metcalf, 99; Pecoria Ins. Co. vs. Frost, 37 Ill. 333; Bean vs. Atlantic R. R. Co., 58 Me. 82; Connecticut Ins. Co. vs. Erie R. R., 73 N. Y. 399; Swarthout vs. Chicago and N. W. R. Co., 49 Wisc. 625); and as against a colliding vessel (Fretz vs. Bull, 12 How. 466).

Where the primary agreement to indemnify is created by a contract like this, the right of subrogation, given to the insurer, ought not to have less effect than where the primary obligation to indemnify is created by the common law of carriers or arises out of the legal obligation to repair a tort. In the language of Mr. Justice Strong, in Hall & Long vs. Railroad Companies, *supra*, "his (the insurer's) right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent, not at all upon privity of contract, but worked out through the right of the creditor and owner."

It was none of the business of the defendant how much the insurance companies had paid, nor how they and the plaintiff proposed to divide the sum for which the Railroad Company was liable. This point is covered exactly by the language of Mr. Justice Woods in deciding the case of Mobile and Montgomery Railroad Company vs. Jurey, 111 U. S. p. 593. He said: "Although the suit is brought for the use of the insurer, and it is the sole party beneficially interested, yet its rights are to be worked out through the cause of action which the insured has against the common carrier. The legal title is in the insured, and the carrier is bound to respond for all the damages sustained by the breach of contract. If only part of the loss has been paid by the insurer, the insured is entitled to the residue. How the money recovered is to be divided between the insured and the insurer is a question which interests them alone, and in which the common carrier is not concerned."

So far as the defendant was concerned in this case, it had contracted to indemnify the plaintiff from loss by fire. This contract was not strictly a fire insurance contract any more than the obligation of a carrier to be responsible for loss by fire constitutes the carrier an insurer, technically speaking. As Judge Strong said in the case above cited: "A carrier is not an insurer, though often loosely so called. The exent of his responsibility may be equal to that of an insurer, and even greater, *but its nature is not the same.* His contract is not one for indemnity, independent of the care and custody of the goods. He is not entitled to a cession of the remains of the property, or to have the loss adjusted on principles peculiar to the contract of insurance."

So we say here, the contract of indemnity, assumed by the defendant, was merely incident to the custody and operation of the plaintiff's cars by it, and was not an independent contract of insurance, to be settled and adjusted on the basis of a fire loss.

It was, therefore, a matter of utter indifference to the defendant whether the plaintiff insured the cars against fire—a part of the risk assumed by it—or not. The measure of its obligation was fixed by its contract, and whether it had to pay the value of the cars to the plaintiff, or to any subrogee or transferee of the plaintiff, was a matter in which it had no concern, because it did not affect its liability.

Hence, the correctness of the Court's charge, that the insurance of the cars by the plaintiff was *res inter alios acta*, which had no determining effect on the right of the plaintiff to recover. If this is true where the insurer is subrogated to the claim of the plaintiff, is it not all the more true, if there is no subrogation? In that event the plaintiff prosecutes his case in his own right, and may do with the avails of the litigation what he pleases. The defendant responds to his obligation and no more. What the defendant has agreed or contracted with other parties is none of his business, as it neither increases nor lightens his burden.

Fourth. As a last desperate effort, the defendant, although it had made no plea that the contract sued on was void, asked the Court to charge the jury that the whole contract was void on its face, because of the provisions of the 11th article, which it terms as a monopoly and a contract in restraint of trade. That article is as follows:

"The Railway Company hereby agrees that the Pullman Company shall have the exclusive right for a term of fifteen years from the date hereof, to furnish for its use of the Railway Company drawing room or parlor and sleeping cars on all the passenger trains of the Railway Company and over its entire line of railway and on all roads which it controls or may hereafter control by ownership, lease or otherwise, and also on all passenger trains on which it may, by virtue of contracts or running arrangements with other roads, have the right to use such cars, and that it will not contract with any other party to run said class of cars on and over said lines of road during said period of fifteen years."

In the first place, there is no law in Louisiana or elsewhere compelling railroads to furnish sleeping car facilities to their passengers or to enforce them to allow sleeping car companies to establish competition in such facilities on their lines of road. There could not